

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR FLORIDA GULFCOAST BROADCASTERS, INC.
APPELLANT IN CASE No. 19,048

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,048

FLORIDA GULFCOAST BROADCASTERS, INC., *Appellant*,

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee*,
WTSP-TV, INC., *Intervenor*.

No. 19,172

SUNCOAST CITIES BROADCASTING CORP., *Appellant*,

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee*,
WTSP-TV, INC., *Intervenor*.

965

United States Court of Appeals
for the District of Columbia Circuit

No. 19,175

FILED APR 16 1965

TAMPA TELECASTERS, INC., *Appellant*,

v.

Nathan J. Paulson
CLERK

FEDERAL COMMUNICATIONS COMMISSION, *Appellee*,
WTSP-TV, INC., *Intervenor*.

*On Appeal From Decisions of the
Federal Communications Commission*

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STATEMENT OF QUESTIONS PRESENTED

1. Whether the Commission's comparative criteria presumptions are arbitrary, capricious and unreasonable.
2. Whether in the remand hearing in this proceeding the Commission committed error in the following respects:
 - (a) In refusing to reevaluate all applicants for a new television station license for Channel 10 at Largo, Florida, on a comparative basis in light of the entire record in this proceeding; and
 - (b) In failing to conclude that the evidence in the remand proceeding required the withdrawal of the "significant preference" for past broadcast record awarded to the winning applicant (WTSP-TV) in the original hearing.
3. Whether the Commission committed error in the remand hearing in the proceeding by reason of its failure to conclude that the winning applicant (WTSP-TV) in the original hearing was absolutely disqualified on character grounds from receiving the television facility for Channel 10 at Largo, Florida.

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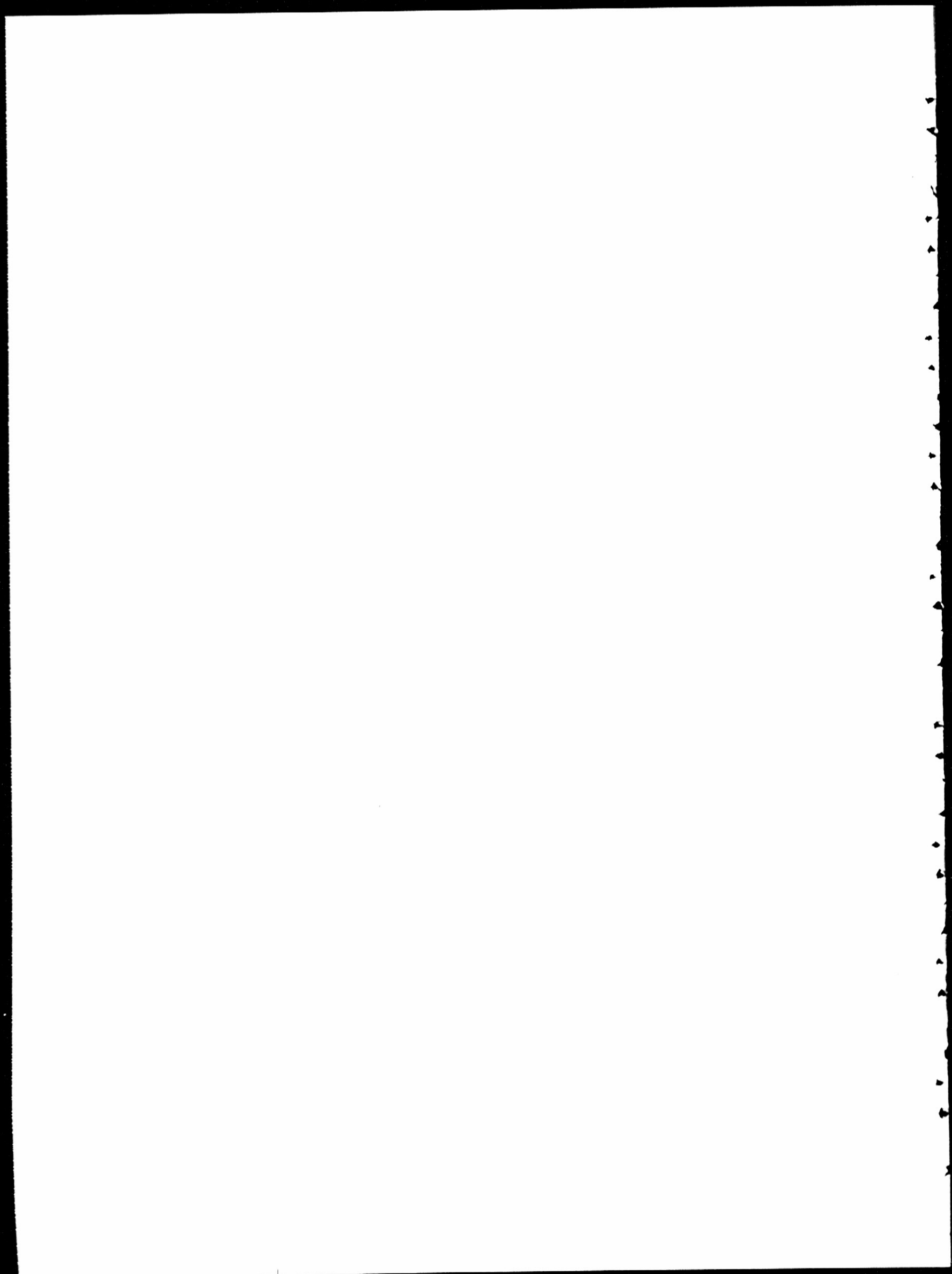
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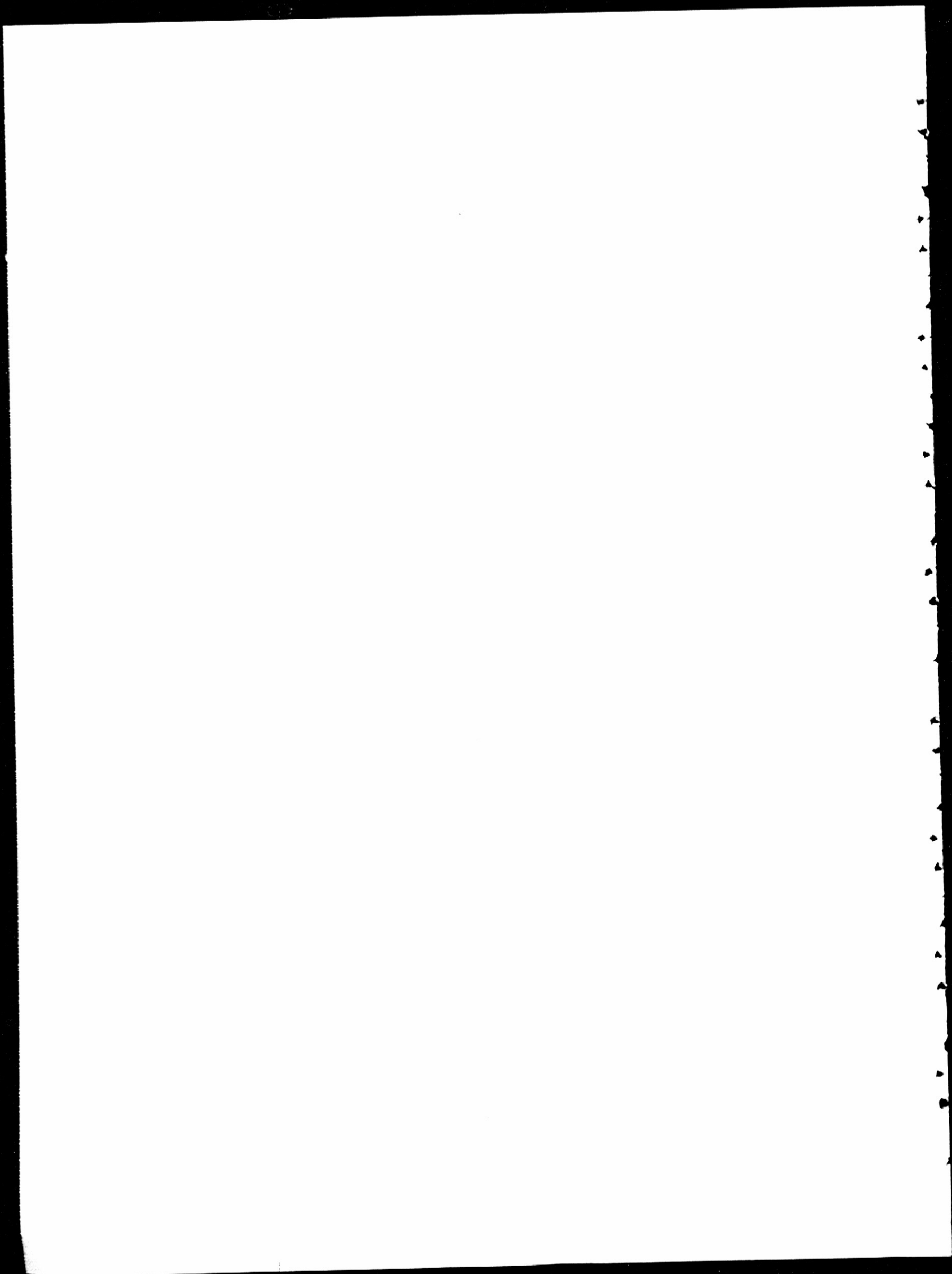
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*On Appeal From Decisions of the
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BRIEF FOR FLORIDA GULFCOAST BROADCASTERS, INC.
APPELLANT IN CASE No. 19,048



JURISDICTIONAL STATEMENT

The appeal in Case No. 19,048 is by Florida Gulfcoast Broadcasters, Inc. (hereinafter referred to as Gulfcoast) pursuant to Section 402(b)(1) of the Communications Act of 1934, as amended, 47 U.S.C. 402(b)(1), from (1) a decision of the Federal Communications Commission (hereinafter referred to as the Commission) released January 19, 1962 (R. 4810-4838) denying Gulfcoast's application for construction permit for a new television station to operate on Channel 10 in Largo, Florida and granting the competing application of WTSP-TV, Inc. (hereinafter referred to as WTSP-TV) and (2) a decision of the Commission released November 6, 1964 (R. 6208-6236) denying Gulfcoast's petition for reconsideration and affirming the grant of the application of the Intervenor and the denial of the application of Gulfcoast. The Notice of Appeal was filed by Gulfcoast in this Court on December 7, 1964. The appeals in Cases Nos. 19,172 and 19,175 were taken by Suncoast Cities Broadcasting Corp. (hereinafter referred to as Suncoast) and Tampa Telecasters, Inc. (hereinafter referred to as Tampa), respectively, and relate to the same proceeding before the Commission. These three appeals were consolidated by order of this Court on March 23, 1965.

STATEMENT OF THE CASE

Before the Commission this proceeding involved six mutually exclusive applications for a new television station to operate on Channel 10 in Largo, Florida.¹ The applicants were Gulfcoast, Suncoast, Tampa, WTSP-TV, the City of St. Petersburg, Florida (hereinafter referred to

¹ Originally all applicants had specified either St. Petersburg or Tampa as the community to be served, but all applications were amended to specify Largo for reasons not now material.

as City) and Bay Area Telecasting Corp. (hereinafter referred to as Bay Area).² The six applications were designated for hearing in May 1958, on the standard comparative issue as to which applicant would best serve the public interest (R. 288-290).³ After an extensive hearing the Examiner issued an initial decision in February 1961 nearly three years after designation favoring WTSP-TV on a comparative basis, granting its application and denying the other five. *Florida Gulfcoast Broadcasters, Inc.*, 32 F.C.C. 219, 23 Pike & Fischer R.R.⁴ 28 (1961) (R. 4556-4689). The Examiner found all applicants to be equal in proposed staffs, equipment and program policies (23 R.R. 132), he disfavored Gulfcoast and Tampa on their studio proposals, and disfavored Tampa on the comparative criterion of local residence and civic participation, but gave no preference among the other five applicants (*Id.*). The Examiner also preferred WTSP-TV on the comparative criterion of integration of ownership and management, program planning, proposed programs and past broadcast record; and an equal first preference with other applicants in the factors of broadcast experience and diversity of business interests. On the factor of diversification of mass media of communications, WTSP-TV was placed fifth (*Id.*).

In considering Gulfcoast, the Examiner gave "high ratings" in broadcast experience, local residence, civic participation, but said that its studio proposal "weighed heavily against it," even though it was the only applicant to propose a studio in Largo, the community to be served, and in effect he disqualified Gulfcoast because of what he conceived the Commission's policy on diversification of mass media to be (*Id.* at p. 133).

² City and Bay Area have not filed appeals in this Court.

³ There was another issue regarding aeronautical hazard of antenna structures which is of no materiality at this juncture.

⁴ Citations to Pike and Fischer Radio Regulation will hereinafter be cited "R.R."

Numerous exceptions to the initial decision were filed by all parties, the Commission heard oral argument and issued a decision approximately one year after the initial decision, granting the application of WTSP-TV, but on a substantially different basis than that found by the Examiner, and with only three of the seven Commissioners in the majority.⁵ *Florida Gulfcoast Broadcasters, Inc.*, 32 F.C.C. 197, 23 R.R. 1 (1962) (R. 4810-4838). In its summary of the comparison among the applicants, the majority noted significant weaknesses in the applications of Tampa, Bay Area, Suncoast, and City and stated that the liabilities of these applicants "... render each decidedly inferior to Gulfcoast and WTSP-TV and further discussion as their comparative standings would be non-productive." (23 R.R. 15). The Commission then compared Gulfcoast and WTSP-TV and stated that WTSP-TV was to be favored in certain areas and Gulfcoast in others, namely, area familiarity⁶ and integration of ownership and management. The Commission then noted that past broadcast record in the area to be served was the most significant basis of comparison and concluded that WTSP-TV had better served the area in a short period than Gulfcoast had served it over a long period of radio stewardship and the "... significant preference ..." awarded to WTSP-TV for past broadcast record was in effect a controlling preference which decided the case (*Id.* at 14, 16). The dissenters wholly disagreed with the assessment of the past broadcast criterion.

Upon petitions for reconsideration and for reopening of the record, the Commission, by a vote of four to one, with two Commissioners not participating, issued a memorandum opinion and order staying the construction permit granted to WTSP-TV and denying the petitions to re-

⁵ The vote was three to two, with two Commissioners not participating (32 F.C.C. 197, 198, 23 R.R. 1, 4).

⁶ The Commission combined three of the criteria used by the Examiner, local residence, civic participation and diversity of business interests of principals into a single criterion.

open the record on the grounds of timeliness. Nevertheless it reopened the record and remanded the proceeding to the hearing examiner on its own motion. The Commission also held the petitions for reconsideration of its decision in abeyance pending the further hearing ordered by the Commission. *Florida Gulfcoast Broadcasters, Inc.*, 23 R.R. 901 (1962) (R. 5044-5048).

On petition of WTSP-TV, the Commission's Review Board subsequently construed the issues in the remand proceeding, stating that they were to be construed narrowly and that updating of the record as to all parties was not contemplated. *Florida Gulfcoast Broadcasters, Inc.*, 24 R.R. 800 (1962) (R. 5108-5113).

Some fourteen months after the Commission's remand order, the examiner after the rehearing issued a supplemental initial decision in which he concluded that WTSP-TV was still entitled to a preference for past performance in spite of the record adduced and acceded to the Review Board's construction of the issues on updating the record of other applicants on a comparative basis. *Florida Gulfcoast Broadcasters, Inc.*, 37 F.C.C. 856, 915-16, 4 R.R. 2d 27, 79-80 (1963) (R. 6016-6081). The examiner did, however, indicate that the program performance of WTSP-TV should be "... closely surveyed by the Commission ..." upon renewal indicating some skepticism that WTSP-TV could be relied upon because of the wholesale change and downgrading of its St. Petersburg radio station programming (*Id.*). Again, exceptions were filed, oral argument heard by the Commission, and in November of 1964 some fourteen months after the examiner's supplemental initial decision, the Commission adopted a second decision by a vote of four to one, with two not participating, again granting the WTSP-TV application. *Florida Gulfcoast Broadcasters, Inc.*, 37 F.C.C. 833, 4 R.R. 2d 1 (1964) (R. 6208-6236).

The Commission reaffirmed its previous decision on the basis that WTSP-TV had not been shown in the remand hearing to lack the char-

acter qualifications which would on an absolute basis disqualify it from being a licensee of the Commission. The Commission then undertook to dispose of the petitions for reconsideration which had been filed two and a half years before and had been held in abeyance pending consideration of the evidence obtained at the reopened hearing. The Commission denied these petitions for reconsideration principally on the basis that the proceeding had been pending for a considerable length of time and on a very restrictive view of its responsibilities to reconsider its previous decision in the public interest. The Commission expressly declined to recompare the applicants based on the evidence obtained at the reopened hearing or to reopen the record for further comparative hearing to bring the original record up to date.

After the Commission's second decision in November 1964, Gulfcoast's appeal was lodged in this Court under the provisions of Section 402(b)(1) of the Communications Act of 1934, as amended, 47 U.S.C. 402(b)(1). Others sought reconsideration by the Commission for a second time and the Commission denied it by order released on January 13, 1965. *Florida Gulfcoast Broadcasters, Inc.*, 38 F.C.C. 1, 4 R.R.2d 81 (1965) (R. 6261-6262). Subsequent to this denial, Suncoast and Tampa lodged appeals in this Court in Cases Nos. 19172 and 19175.

STATUTES AND REGULATIONS INVOLVED

The relevant portions of the Communications Act of 1934, as amended and the Rules and Regulations of the Commission are set forth in Appendix A, *infra*.

STATEMENT OF POINTS

1. This case must be reversed and remanded because it has been decided by the Commission on the basis of criteria which are arbitrary and capricious.

2. Failure by the Commission on reconsideration to consider the entire record before it on a comparative basis is clear procedural error requiring reversal.

3. WTSP-TV is absolutely disqualified or at least must receive a comparative demerit for misrepresentation to and *ex parte* contacts with the Commission.

SUMMARY OF ARGUMENT

I

The comparative criteria that have been developed by the Commission to select an applicant which can best be relied upon to operate in the public interest are based upon inferences or presumptions which are inconclusive, often contradictory and involve highly subjective Commission judgments which must be made regarding a virtually infinite variety of comparisons between applicants and, as a result, Commission opinions are a hopelessly tangled web of comparative subjective judgments. Since virtually every conceivable fact about an applicant has a bearing under some comparative criterion, comparative hearing records have become unmanageable. The Commissioners decide cases by a vote only and do not formulate the rationale supporting their decision. The reasoning expressed in Commission opinions represents an attempt to justify the decision of the moment, not conclusions upon a reasoned judgment under the statutory public interest standard. The Commission's comparative decisions follow no consistent policy or precedent.

In the distant past, it was understandable that the Commission established presumptions on an *a priori* basis to select from competing applicants. However, it has now had more than thirty years experience during which it has licensed approximately 5,000 broadcast stations and regularly receives information from them regarding their program

service. And yet the Commission has never undertaken studies or inquiries to test the validity in practice of its *a priori* presumptions in the comparative criteria. A survey of 35 comparative television grants since 1952 shows that not a single one of the winning applicants has ever lived up to its program proposals for operation in the public interest. The doctrinaire presumptions have never been justified on the basis of facts or experience. *Per contra*, experience has shown that these presumptions are devoid of substance.

II

The Commission's explicit failure to consider the whole record on a comparative basis, including both the original record and the reopened record, as it is required to do under the Administrative Procedure Act and *Universal Camera Corp. v. NLRB, infra*, in reconsidering its first decision after remand to the hearing examiner for additional hearing is clear procedural error requiring reversal. Upon reconsideration under Section 405 of the Communications Act, the Commission may not limit its analysis of the evidence obtained in the rehearing to a determination whether or not it showed that the winning applicant was absolutely disqualified from obtaining a grant. *Enterprise Co. v. FCC, infra*, and *W. S. Butterfield Theatres, Inc. v. FCC, infra*, require that the Commission consider the effect of changed circumstances on its original comparative determination. In this proceeding the changed circumstances involved a wholesale downgrading of programming by the winning applicant on its Station WLCY operating in St. Petersburg, Florida in the area to be served which downgrading vitiated the "... significant preference ..." for past broadcast record which had been the controlling preference in the original hearing leading to the Commission's choice of WTSP-TV rather than appellant Gulfcoast. Failure properly to consider the remand evidence as it affected the comparison between WTSP-TV and Gulfcoast is clear procedural error requiring reversal.

III

The Commission failed in both its decisions below in this proceeding to evaluate properly the misrepresentations of the winning applicant's principals to the Commission concerning log keeping and *ex parte* contacts with members of the Commission by the same principals through mailing of self-laudatory station promotional materials to the Commission which were also offered in evidence. These factors require that WTSP-TV be found to lack the character qualifications to be a licensee in the light of numerous recent decisions of this court and the Commission. At the very least, they require that WTSP-TV be assessed a comparative demerit for these practices. Since they directly concern programming, they require that the ". . . significant preference . . ." awarded to WTSP-TV for past broadcast record be withdrawn (see Point II).

ARGUMENT

I

**This Case Must Be Reversed and Remanded Because It Has
Been Decided by the Commission on the Basis of
Criteria Which Are Arbitrary and Capricious**

A.

The statutory standard by which the Commission must determine which of the competing applicants for a broadcast facility is to be awarded the facility is the "public interest, convenience or necessity." Section 307(a) of the Communications Act; *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134 (1940). The Commission must make such a determination on a rational basis, supported by the evidence, and cannot do so on an arbitrary or capricious basis. *FCC v. Pottsville Broadcasting Co.*, *supra*; *FRC v. Nelson Bros.*, 289 U.S. 266 (1933); *Johnston Broadcast-*

ing Co. v. FCC, 85 U.S. App. D.C. 40, 175 F.2d 351 (1949).

The Commission has developed a number of criteria for use in making such a determination. These criteria and the nature of their application in comparative cases have been described by the Commission⁷ as follows:

In comparative proceedings . . . the Commission has over the years developed as guides criteria to be used in resolving such proceedings from the public interest viewpoint. Included are local residence of the principals of the applicants; the extent of participation by local principals in the civic life of the community proposed to be served; the diversification of occupations of the principals within the community to be served; the broadcast and management experience to be brought to bear on the operation proposed; the extent of the integration of ownership with management of the proposed operation; the past broadcast records of the applicants particularly in the community involved; the planning and preparation shown for the operation proposed; the program policies proposed to be followed; the programming proposed; the adequacy of equipment, studios and staff insofar as such relates to the ability of the applicant to effectuate the programming proposed and effectuation of the Commission's policy as a diversification of the ownership of media of mass communications. To the extent they are present, these criteria are considered and weighed in each proceeding and are accorded the same significance. The weight given to any or all such factors or criteria is necessarily measurable only upon consideration of the circumstances and conditions present in the actual hearing case. In the ultimate determination, applicants may be so equal as to make a matter, normally of little significance, or a slight superiority in one factor, controlling. An applicant may be preferred on several important factors,

⁷ Survey and Study of Administrative Organization, Procedure and Practice in Federal Agencies of the House Committee on Government Operations, 85th Cong. 1st Sess., pp. 1305-6 (1957).

but a wide superiority of another applicant as to a single factor may be determinative.

These criteria have been developed by the Commission on a case-by-case basis. Each criterion has been justified on the basis that it has, or appears to have, some bearing on the question of which of the competing applicants can be most relied upon to carry out programming to serve the public interest. For example, the criterion of "local residence" is based on the inference that a local resident will be more likely to operate the broadcast facility attuned to the local needs, interests and tastes than a non-resident. For another example, the criterion of "broadcast experience" is based on the inference that an applicant which has had experience in the operation of broadcast facilities will be more likely to operate the broadcast facility to serve the public interest than an applicant which has had no such experience.

These inferences or presumptions obviously are not and cannot be conclusive and in fact they often are brought into conflict with each other. The Commission has on a number of occasions had to choose between the presumptions referred to in the two examples above, i.e., between one applicant made up of local residents and another applicant having a record of experience in the operation of broadcast facilities. In making such a choice the Commission has sometimes favored the former, e.g., *Westinghouse Radio Stations, Inc.*, 10 R.R. 878 (1955); *Bamberger Broadcasting Service, Inc.*, 3 R.R. 914 (1946), sometimes the latter, e.g., *St. Louis Telecast, Inc.*, 22 F.C.C. 625, 12 R.R. 1289 (1957); *The Tribune Co.*, 9 R.R. 719 (1954), affirmed sub nom. *Pinellas Broadcasting Co. v. FCC*, 97 U.S. App. D.C. 236, 230 F.2d 204 (1956), cert. den., 350 U.S. 1007 (1956). Another conflict that has arisen on a number of occasions is that between the "local residence" criterion and the Commission's policy favoring "diversification of ownership mass media of communication." Judge Friendly has pointed out that in his opinion it is difficult to conceive of an applicant which is more attuned

to the needs, interests, and tastes of the community than a local newspaper.⁸ An applicant which owns and operates a local newspaper brings into play a conflict between the presumption flowing from the criterion of "local residence" and the Commission's "diversification" policy. Here, also, the Commission has sometimes favored such an applicant, *Columbia Amusement Co.*, 12 R.R. 509 (1956); *WHDH, Inc.*, 13 R.R. 507 (1957), reversed on other grounds sub nom. *Massachusetts Bay Telecasters v. FCC*, 104 U.S. App. D.C. 226, 261 F.2d 55 (1958), cert. den. sub nom. *WHDH, Inc. v. FCC*, 366 U.S. 918 (1961), sometimes not, *McClatchy Broadcasting Co.*, 9 R.R. 1190 (1954), affirmed, *McClatchy Broadcasting Co. v. FCC*, 99 U.S. App. D.C. 195, 239 F.2d 15 (1956), cert. den. sub nom. *Sacramento Telecasters, Inc. v. McClatchy Broadcasting Co.*, 353 U.S. 918 (1957); *Loyola University*, 12 R.R. 1017 (1956) affirmed sub nom. *Noe v. FCC*, 104 U.S. App. D.C. 221, 260 F.2d 739 (1958), cert. den., 359 U.S. 924 (1959); *Appalachian Broadcasting Co.*, 11 R.R. 1327 (1956).

The use of these presumptions obviously involves highly subjective judgments on the part of the Commission. Moreover, each applicant presents a composite of features relating to all or most of the comparative criteria. The comparative differences between applicants under these criteria are virtually infinite in number and degree. The application of these presumptions to the factual differences among applicants involves literally scores of subjective, comparative judgments. As a result, the Commission's opinions in comparative cases, which attempt to explain the application of the criteria to support the result reached by the Commission, consist of a bewildering array of "preferences" (which may be substantial, moderate, slight, etc.), "demerits" (which are also graded), numerical rankings of applicants under various criteria, etc., followed by the Commission's pronouncement as to which applicant is the winner.

⁸ Henry J. Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards*, 75 Harv. L. Rev. 1055, 1060-61 (1962).

The Commission's first opinion in the instant case (R. 4810-4838) is illustrative of the bewildering nature of this process. Under the composite criterion of "area familiarity," made up of "local residence," "civic participation" and "diversification of business interests," the Commission concluded that two of the six applicants "have earned high marks," but that they are "only slightly preferred" over Gulfcoast. WTSP-TV was ranked "fourth" under this criterion. Under the criterion of "integration of ownership with management," Gulfcoast was ranked in first place and the Commission concluded that it was entitled to a "clear preference" over WTSP-TV which was ranked second among the six applicants.

Under the criteria of "broadcast experience" and "broadcast record" WTSP-TV was "preferred slightly" and accorded a "significant preference," respectively, over Gulfcoast which was ranked second among the six applicants. Under the criterion of "diversification of ownership of mass communications media," WTSP-TV was ranked in fifth place and Gulfcoast was ranked in sixth place. The Commission then diluted the preferences accorded to Gulfcoast as "less significant" in light of its determination under the criterion of "broadcast record"⁹ and announced that WTSP-TV was the winner of the channel.

Over the years, the list of comparative criteria has expanded to the point where virtually every fact about an applicant, its principals, its planning and its proposals is of some relevance to some comparative criterion. As a result, the parties place in evidence minute details regarding every facet of their case and cross-examination is equally detailed and extensive. Rarely is an item of evidence excluded as irrelevant or immaterial. The result has been voluminous records and

⁹ The Commission's opinion relies upon the case of *Pinellas Broadcasting Co. v. FCC, supra*, as authority for downgrading the significance of other criteria when there is a record of past performance. As will be shown, the winning applicant in the *Pinellas* case has not proved to be a reliable choice to carry out its program proposals to serve the public interest.

interminable proceedings. The instant proceeding was commenced in 1958. It has involved nearly 100 days of hearings and the record is nearly 20,000 pages in length. This is not atypical of comparative television proceedings.

In the decision-making process, the Commissioners hear oral argument and may also be briefed on the case by their immediate staffs. However, it is inconceivable that the Commissioners have a thorough grasp of the hearing record in making their decision. The decision is reached by a vote of the Commissioners. A separate office, created for this purpose, is instructed to draft an opinion supporting the vote of the Commissioners. Since there is a criterion covering virtually every aspect of an applicant's case, the Commissioners' vote can be supported regardless of which applicant has been selected in the voting. The reasoning expressed in the Commission's opinions represents an attempt to justify the decision of the moment, not the conclusions involved in a reasoned judgment under the public interest standard.

In this process, the benefit of having those who made the decision go through the thought process of formulating the rationale therefor, pursuant to a consistent line of policy, is lost. This has been commented on by FCC Commissioner Loevinger¹⁰ as follows:

The most characteristic of the agency opinions is the impersonal institutional opinion. While this is in some respects a response to the pressures and necessities of agency operation it does have certain weaknesses as compared to the personal decision. The impersonal institutional opinion does not fully perform the function of either testing the validity of the conclusion reached or of setting forth the attitude of the decision maker. A staff member is instructed to bring in an opinion reaching a specified result although he may disagree with the

¹⁰ Address delivered before the Law Forum of the University of North Dakota, March 27, 1965.

result and has no authority to change it. As a consequence, the institutional opinion tends to be a lengthy recital of factual detail with little generalization or reasoning and a great reliance on murky language and institutional cliches.

The foregoing analysis of the Commission's comparative criteria and application thereof may be summarized as follows:

1. The criteria are based on inferences or presumptions which involve highly subjective judgments.
2. Such judgments relate to a virtually infinite variety of comparisons between applicants.
3. The criteria involve virtually every conceivable fact regarding an applicant leading to unmanageable hearing records.
4. Those who make the decision do so by a vote and do not formulate the rationale supporting their vote.

In light of these circumstances, it is small wonder that the Commission's decisions in comparative cases are inconsistent, vacillating and have drawn fire from all quarters. In 1948, the Hoover Commission reported on the matter as follows:

Perhaps the best way to describe the intellectual operations of the Commissioners is to quote their own characterizations of what they do at meetings when these cases arise. One of them stated that it was "largely a matter of snap judgment," another that it was a question of "considerations of expedience." There is no reason to labor the point. Not a single person at the Commission who is concerned with broadcast work will even pretend to demonstrate that the Commission's decisions in these cases have followed a consistent policy or, for that matter, any policy other than the desire to dispose of cases and,

if possible, to do so by making grants.¹¹

In 1958, Chief Judge Bazelon expressed his concern as follows:

I vote to grant the petition for rehearing en banc in order to reconsider this court's recent rulings which appear to render us powerless to restrain the Commission from employing shifting emphasis of comparative criteria obliterating any predictable pattern of decision.¹²

In 1963, former Commissioner Chairman Newton N. Minow stated as follows in a letter to the President upon his retirement from office:

From its earliest years, the Commission has been called upon to choose between competing applicants for the same broadcasting channel. It has evolved an elaborate set of comparative criteria as guide posts in selecting the applicant which would best serve the public interest. But despite these criteria, I think it is largely true that the Commission has failed to develop any coherent policy in the comparative field. Almost every student of the Commission has reached this conclusion, the most recent being Judge Henry Friendly in his 1962 Harvard Law School paper (see 75 Harv. L. Rev. 1055-1072). I will not here discuss the merits of any particular policy on comparative hearings. Rather, my point is that coherent policies should be developed and that those policies should then lead, logically and consistently, to a fairly predictable pattern in the comparative field. Today, there is no doubt that there are no such policies or pattern. Because of the failure, some broadcasters have come to regard the Commission as arbitrary — as a kind of administrative "Caliban upon Setebos" ("let twenty pass, and stone the twenty-first, . . . just choosing so").¹³

¹¹ Commission on Organization of the Executive Branch of the Government, Committee on Independent Regulatory Commissions, Staff Report on the Federal Communications Commission, II-40 (1948).

¹² *Beachview Broadcasting Corp. v. FCC*, 106 U.S. App. D.C. 341, 342, 273 F.2d 76, 77 (1958), dissenting opinion.

¹³ Letter dated May 31, 1963, 15 Admin. L. Rev. 146-48 (1963).

In the most recent comparative television decision rendered by the Commission, *Veterans Broadcasting Company, Inc.*, 4 R.R. 2d 375 (1965), Commissioner Loevinger issued a concurring opinion stating as follows:

. . . I believe that this case illustrates the unsatisfactory and inadequate character of the procedures and criteria employed by the Commission for the determination of multi-party comparative proceedings. In a case such as the instant one, with a large number of qualified applicants, an extensive hearing resulting in a voluminous record, long periods intervening between successive stages of the proceedings, and relatively small differences among a number of applicants, the vague and subjective criteria established by Commission precedents combine with the inevitable limitations of time and human memory to make the final result very nearly a matter of chance.

. . . I hope that the Commission will promptly and actively seek to devise better, simpler and more objective criteria and a more expeditious and efficient procedure for the disposition of matters such as this proceeding. *Id.* p. 440.

Leading authorities in the field of administrative law and others have expressed similar views, e.g., Judge Henry J. Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards*, *supra*, and references therein; Prof. Bernard Schwartz, *Comparative Television and the Chancellor's Foot*, 47 Geo. L.J. 655 (1959), and *Oversight and Oversights in Administrative Law Teaching*, 11 J. Leg. Ed. 358 (1959); Prof. Louis L. Jaffe, *Book Review*, 65 Yale L.J. 1068 (1956); and *The Scandal in T. V. Licensing*, 215 Harper's Magazine 77 (1958).

B.

The Federal Communications Commission was established as a regulatory agency to handle the governmental responsibilities with respect to the communications industry. The nature of its functions has been described by the United States Supreme Court as follows:

Perhaps the most striking characteristic of this movement [establishment of regulatory agencies] has been the investiture of administrative agencies with power far exceeding and different from the conventional judicial modes for adjusting conflicting claims — modes whereby interested litigants define the scope of the inquiry and determine the data on which the judicial judgment is ultimately based. Administrative agencies have power themselves to initiate inquiry, or, when their authority is invoked, to control the range of investigation in ascertaining what is to satisfy the requirements of the public interest in relation to the needs of vast regions and sometimes the whole nation in the enjoyment of facilities for transportation, communication and other essential public services. *FCC v. Pottsville Broadcasting Co.*, *supra*, 309 U.S. at 142-143 [footnote omitted].

As has been indicated, the Commission's comparative criteria involve inferences and presumptions that various factors have a bearing on the question of which applicant can best be relied upon to operate the broadcast facility to serve the public interest. During the earlier years, when the Commission had little experience or sources of industry data, it is understandable that the Commission, as an *a priori* matter, felt compelled to establish such presumptions to guide it in selecting from among competing applicants.

However, the Commission has now had more than thirty years of experience in regulation of the broadcasting industry. It has licensed approximately 5,000 radio and television facilities. Each of these licensees submits information regarding its program operations in serv-

ing the public interest at least once every three years in applying for a renewal of the license. And yet, insofar as the Appellant is aware, the Commission has never made a study of the data in its possession or inquiries and investigations in order to test the validity in practice of the presumptions involved in its comparative criteria.

The Appellant has undertaken a survey of the program performance of the winning applicants in comparative television cases decided by the Commission since it lifted the television freeze in 1952. The results of this survey are attached to this brief as Appendix B. During this period there have been 35 cases where the channel was awarded to one of two or more competing applicants in a decision by the Commission *and* where the winning applicant has since filed one or more renewal applications.¹⁴

The results of the study are most illuminating. They reveal a complete failure of correlation between the programming promises for service in the public interest made by the winning applicant — selected upon the basis of presumptions designed to pick the applicant most likely to carry out its promises — and actual performance. This evaluation can best be illustrated by considering local live programming — one aspect of programming that is frequently relied upon by the Commission in evaluating program service, e.g., *Pinellas Broadcasting Co. v. FCC*, 97 U.S. App. D.C. 236, 230 F.2d 204 (1956) cert. den. 350 U.S. 1007 (1956).¹⁵ This survey shows that *not a single one* of the winning

¹⁴ There have been six cases, noted in Appendix B, where the winning applicant sold the television station before it filed any renewal application showing its program performance in serving the public interest. Cf. *St. Louis Amusement Co. v. FCC*, 104 U.S. App. D.C. 45, 259 F.2d 202 (1958) cert. den. 358 U.S. 894 (1958).

¹⁵ In the *Pinellas* case, the winning applicant's proposal to devote 43% of its broadcast time to local live programming was an important decisive factor. Its "agricultural" and "educational" proposals were also a factor. The winning applicant proposed to devote 4.6% and 4.9% of its broadcast time, respectively, to these categories of programming. The winning applicant has since filed three renewal applications (in 1957, 1960 and 1963) which are
(Continued on following page)

applicants in these 35 cases has *ever* lived up to its representations on this score. This survey shows that, on the average, the winning applicants proposed to devote 31.5% of their broadcast time to local live programming whereas, in fact, the winning applicants, on the average, devoted only 11.8% of their broadcast time to such programming.

A comparison of programming representations and performances under other categories of program balance is similarly striking. Of the 35 winning applicants, in their first renewal applications, all but two devoted a greater amount of time to "entertainment" programming than promised in the hearing, only six carried as much "religious" programming as promised in the hearing, only one carried as much "agricultural" programming as promised in the hearing, only four carried as much "educational" programming as promised in the hearing and only six carried as much "discussion" programming as promised in the hearing.

A comparison of the average promises and performances of the 35 winning applicants is as follows:

	<u>Promised</u>	<u>Performance</u>
Entertainment	64.7%	75.1%
Religious	3.5%	2.2%
Agricultural	3.2%	1.5%
Educational	4.6%	3.1%
News	7.6%	6.2%
Discussion	4.0%	1.7%
Talks	11.7%	8.8%
Other	0.7%	1.4%
Total	100.0%	100.0%

(Footnote 15 continued from preceding page)

shown in Appendix B (Station WFLA). It claimed that program performance shown in the 1960 renewal application was not typical of its operations. Program performance shown in the 1957 and 1963 renewal applications indicate that only 24.2% (in 1957) and only 16.2% (in 1963) of broadcast time was devoted to local live programming, that only 3.2% and 1.6% (1957 and 1963, respectively) was devoted to "agricultural" programming and in each application only 2.5% was shown for "educational" programming.

Additional data are set forth in Appendix B regarding promises and performance with respect to local live programming and other categories of program balance referred to above. These data are shown for groups of applicants favored under the principal comparative criteria and show that there is no appreciable difference in the record of performance, whichever comparative criteria have been used to select the winning applicant.

This utter failure of the applicants selected under the Commission's criteria to live up to their programming representations for service in the public interest is graphically illustrated by two cases which have come before this Court involving post-grant changes in programming or allegations thereof. *W. S. Butterfield Theatres, Inc. v. FCC*, 99 U.S. App. D.C. 71, 237 F.2d 552 (1956) and *Radio Station KFH Co. v. FCC*, 101 U.S. App. D.C. 164, 247 F.2d 570 (1957).

In the *Butterfield* case, this Court reversed and remanded the case for a further hearing regarding certain post-grant changes in the winning applicant's proposals including changes in program proposals. The Court ruled that these program changes, including allegedly minor changes in the local live program proposals, must be considered. Following the further hearing and Commission reaffirmance of its decision, the Court affirmed in a *per curiam* opinion, *Id.*, 106 U.S. App. D.C. 283, 272 F.2d 512 (1959). Thereafter, in 1961 and 1964, the winning applicant filed renewal applications. As is shown in Appendix B (Station WJRT), this applicant devoted 21.5% and 15.1%, respectively, of its broadcast time to local live programming as compared with its representation of 33.5% in the comparative hearing.

In the *KFH* case, a losing applicant claimed that during the first six months of operation the winning applicant had not lived up to its programming representations. Commission counsel argued that only "interim operation" was involved. This Court reversed and remanded the case to the Commission, among other grounds, for the Commission

to clarify its ruling on the matter. The winning applicant thereafter filed renewal applications in 1959 and 1962. As is shown in Appendix B (Station KARD), a comparison of this applicant's representations in the comparative hearing and its performance as shown in these renewal applications is as follows:

	<u>Representations In Hearing</u>	<u>1959 Renewal</u>	<u>1962 Renewal</u>
Local Live	48.0%	16.8%	16.7%
Entertainment	53.7%	74.2%	68.8%
Religious	3.5%	2.6%	2.2%
Agricultural	5.2%	1.5%	1.7%
Educational	8.1%	2.8%	4.5%
News	9.9%	7.9%	11.0%
Discussion	5.3%	1.9%	0.4%
Talks	14.3%	9.1%	11.4%
Other	-	-	-
Total	100.0%	100.0%	100.0%

Gulfcoast does not claim that its survey represents the comprehensive type of survey, study, investigation and research that is necessary in order to establish valid criteria. Only the Commission has the data, resources, personnel and investigatory power to make such a study and evaluation. This survey *does* show that such an evaluation is essential — that the Commission's criteria as applied in this representative sample of comparative television cases have not proved to be a rational guide for the selection of applicants who can be relied upon to carry out their proposals for operation in the public interest. It shows that the presumptions created on a doctrinaire, *a priori* basis have never been justified by the Commission on the basis of facts or experience. The facts and experience that exist reveal all too clearly that the presumptions are devoid of substance.

The discretion of the Commission in the application of the statutory public interest standard, while broad, is not unfettered. It must be ex-

exercised rationally and responsibly. The continued application of the Commission's comparative criteria under these circumstances is an abuse of Commission discretion. The award of broadcast facilities on this basis and in this manner is arbitrary and capricious. This case should be reversed and remanded for the Commission to develop and apply criteria which it can demonstrate are rationally related to the statutory standard of the public interest, convenience or necessity.

II.

Failure by the Commission on Reconsideration To Consider the Entire Record Before It on a Comparative Basis Is Clear Procedural Error Requiring Reversal.

The manner in which the Commission disposed of the various petitions for reconsideration in this proceeding was procedurally and substantively defective, and for this reason alone this Court must reverse both the Commission's decision in this proceeding, *Florida Gulfcoast Broadcasters, Inc.*, 32 F.C.C. 197, 23 R.R. 1 (1962) (R. 4810-4838), and its supplemental decision after remand hearing which disposed of the petitions for reconsideration, *Id.*, 37 F.C.C. 833, 4 R.R. 2d 1 (1964) (R. 6208-6236). In its second decision the Commission concluded that WTSP-TV, based on the reopened record, was not *absolutely* disqualified on character grounds to be a licensee of the Commission and, based on this conclusion, denied the petitions for reconsideration without considering the effect of the evidence obtained in the remand hearing on the *comparative* determination originally made to prefer WTSP-TV to Gulfcoast, and for that matter to the other applicants, *Id.*

It is this limitation of the Commission's consideration after the remand hearing to a determination whether or not WTSP-TV is qualified on an absolute and non-comparative basis that is fundamental error, because the prior grant to WTSP-TV was reinstated without considering the effect of the evidence adduced in the remand hearing on the *compar-*

ative qualifications of Gulfcoast and WTSP-TV and the other applicants to receive the grant for this television facility. This fundamental procedural error compels a reversal.

On the reopened record no recomparison whatsoever was made of the applicants. In denying the petitions for reconsideration, the Commission stated only that:

We have reviewed the record herein in the light of the arguments urged in these petitions and conclude that they have failed to demonstrate either material errors or omissions in that decision. Accordingly, such petitions are denied. See *WWIZ, Inc*, 37 F.C.C. 685, 3 Pike & Fischer R.R. 2d 316 (1964). (4 R.R. 2d 13).

First, such a general statement does not set forth the basis of the Commission's decision with specificity, as required by Section 405 of the Act, 47 U.S.C. Section 405, and applicable decisions, *Johnston Broadcasting Co. v. FCC, supra*; *Radio Station KFH Co. v. FCC, supra*, and it fails to recognize that there is a supplemental record which must be considered as well as the original record. The *WWIZ, Inc.* case was not a comparative case and there was no supplemental record to be considered. Consequently the Commission's action in that case establishes no precedent to refuse reconsideration of the whole record on a comparative basis.

The evidence adduced at the reopened hearing and ignored by the Commission comparatively in its second decision clearly vitiated the comparative preference for past programming which was the determinative factor leading to a grant of the WTSP-TV application in the first place. Had the Commission considered the evidence in the reopened hearing on a comparative basis, it would have been compelled to deprive WTSP-TV of its "... significant preference. . ." (23 R.R. 14) for the operation of its station WLCY in St. Petersburg, especially since the Commission noted in the first decision that operation of this station "... should be considered the most significant to our purposes

here since it is in the community with which we are concerned." (*Id.*). Having awarded the "... substantial preference. ..." for past programming, the Commission may not shut its eyes to facts on the record before it concerning the comparative validity of the WLCY broadcast record after the original hearing record was closed. The evidence in the reopened record discloses, *inter alia*:

(a) That a new station manager of WLCY, Roy Nilson (T. 6517-9, 6420-1) made no study of the manner in which WLCY could serve the public interest prior to his appointment (T. 6541), and instituted a complete change in the programming to a Top 40 format "... with all the 'bizazz' that goes with it" (T. 7829, 7840-1), including a large number of contests, sensational type news and elaborate sound effects (R. 5282-3).

(b) That at or about the time of the change of program format the following public service programs relied upon in the earlier hearing by WTSP-TV for a past performance preference (R. 2742-*et seq.* (WTSP-TV Ex. 3)) were dropped from the WLCY schedule and not replaced by any equivalent program:

Suncoast Town Forum, February 21, 1960 (T. 6941).

Social Security Program, February 20, 1960 (R. 5286-7, T. 6926).

4-H Program, February 1960 (T. 6908).

***Voice of the Americas**, February 27, 1960 (T. 6924-5).

***Progress of Pinellas**, March 26, 1960 (T. 6928).

***Conversational Spanish**, April 13, 1960 (T. 6936).

Church Bulletin Board, February 13, 1960 (T. 6943).

Women's Senior Employment, February 21, 1960 (T. 6952).

Program for Teenagers, February 6, 1960 (T. 6951).

***VA Program**, February 14, 1960 (T. 6931-2).

* Sam Rahall, the principal St. Petersburg resident owner of WTSP-TV, Inc. testified that these programs were replaced by "spot carriers," "entertainment shows of features and news and so forth," "personality shows" and "recorded entertainment and news" (T. 6925, 6929, 6932, 6939).

(c) That virtually all of the station's remaining so-called "public service programs" were transferred to the time segment between 10:00 p.m. and 12:00 p.m. despite the fact that audience ratings showed that WLCY had its largest audience early in the morning and larger audiences at the times that this programming had formerly been broadcast (T. 6279-81).

(d) That after station WLCY's format change, the majority of non-entertainment "so-called public service programs" in other important categories were broadcast only between midnight Saturday night and before noon on Sunday under the new schedule (T. 6638, 6954-5, 7078-82).

(e) That two 15-minute news broadcasts each day were dropped and that the remaining 5-minute newscasts usually consisted of only approximately 2-1/2 minutes of news, the rest commercials (T. 8072-4).

(f) That a number of news commentators were dropped from the station at one time or other, among them Alex Dreier, Drew Pearson, Fulton Lewis, Jr., and Gabriel Heatter (T. 5956-7).

The foregoing are merely illustrative examples of a number of the changes which individually and collectively add up to a complete overhaul and downgrading of the programming of WLCY on which the Commission had relied in order to award a "... significant preference..." in the first decision to WTSP-TV which, in the context of the Commission's decision in this case, was the controlling preference deciding the case. Appellant Gulfcoast recognizes that it is not for the court to evaluate the remand evidence initially to determine its effect on the comparative hearing determination; however, it is necessary to set forth these examples to lay bare the enormity of the Commission's error in not considering these and other facts in re-comparing the applicants.

The Commission fundamentally misunderstands its obligations under the Act and prior decisions of this Court and the Supreme Court with regard to consideration of the record before it. A comparative hearing does not cease to be a comparative hearing as long as timely petitions for reconsideration are filed, *Enterprise Co. v. FCC*, 97 U.S. App. D.C. 374, 231 F.2d 708 (1955);¹⁶ *W. S. Butterfield Theatres, Inc. v. FCC*, *supra*. In addition:

" . . . the Commission's responsibility at all times is to measure applicants by the standard of "public convenience, interest or necessity." *FCC v. Pottsville Broadcasting Co.*, *supra*, 309 U.S. at 145.

Since administrative agencies are ". . . very different from lower courts. . .," *Id.*, the judicial review function is also different. It is governed by Section 10(e) of the Administrative Procedure Act, 5 U.S.C. Section 1009(e) which defines the scope of review in subsection (e) thereof, and contains the following provision:

In making the foregoing determinations the Court shall review the *whole*¹⁷ record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error. (Emphasis supplied).

That this sentence means what it says has been indisputable since the decision of the Supreme Court in *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951). Mr. Justice Frankfurter, speaking on this point for a unanimous Court, stated as follows:

Whether or not it was ever permissible for courts to determine the substantiality of evidence supporting a Labor Board decision merely on the basis of evidence

¹⁶ Cert. den. sub nom. *Beaumont Broadcasting Corp. v. Enterprise Co.*, 351 U.S. 920 (1956).

¹⁷ The same word was emphasized by the Supreme Court in *Universal Camera Corp. v. NLRB*, see footnote at 340 U.S. 482-3.

which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn, the new legislation [APA] definitely precludes such a theory of review and bars its practice. The substantiality of evidence must take into account whatever in the record fairly detracts from its weight . . . *Id.*, pp. 487-8.

* * *

Congress has merely made it clear [in the APA] that a reviewing court is not barred from setting aside a Board [agency] decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's [agency's] view. *Id.*, p. 488.

To the same effect, see *NLRB v. Pittsburgh Steamship Co.*, 340 U.S. 498, 502 (1951):

The court painstakingly reviewed the record and unanimously concluded that the inferences on which the Board's findings were based were so *overborne by evidence calling for contrary inferences* that the findings of the Board could not, *on the consideration of the whole record*, be deemed to be supported by "substantial" evidence. (Emphasis supplied).

Surely, if a court on judicial review of agency action must under the APA consider the *whole* record, and weigh evidence pro and con, the Commission can do no less since an agency's obligation under Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 1006(c), is likewise to consider:

. . . the *whole* record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable probative and substantial evidence. (Emphasis supplied).

It must be presumed that the "... whole record. . ." in Section 7(c) is the same as the "... whole record. . ." in Section 10(e) of the APA.¹⁸ Therefore, it is a violation of the APA for the Commission to obtain a supplemental record and then refuse to consider the evidence obtained thereby. This is the basic procedural error in this case which requires a reversal.

It is illuminating to examine what the Commission's understanding of its rehearing and reconsideration duty is because none of the foregoing authorities was mentioned, much less considered, in the Commission's decision on reconsideration in this case. The Commission simply alluded to the protracted nature of the hearing, an argument already disposed of above, and then quoted verbatim the following paragraph from another case, *WWIZ, Inc.*, 37 F.C.C. 685, 686, 3 R.R. 2d 316, 317 (1964):

It is the general and sound rule that the only valid grounds for rehearing is [sic] manifest error or omissions so material that their corrections will result in substantial alteration of the original decision. 5 CJS § 1411; see US Sup Ct Rule 33(2). Correspondingly, it is universally held that rehearing will not be granted merely for the purpose of again debating matters on which the tribunal has once deliberated and spoken. *Louisell and Degnan, Rehearing in American Appellate Courts*, 44 Cal. L.R. 627 (1956). The statutes and regulations make plain that the same rule is to be applied to the Commission. 47 USC § 405; 47 CFR § 1.106(1) [sic].¹⁹

¹⁸ See *Atlantic Cleaners and Dyers, Inc. v. U. S.*, 286 U.S. 427, 433 (1932); *U.S. v. Cooper Corp.*, 312 U.S. 600, 607 (1941).

¹⁹ The Commission even miscited its own rules in the *WWIZ, Inc.* case and repeated the error in this proceeding. 47 C.F.R. Section 1.106(1) is presumably 47 C.F.R. Section 1.106(c)(1). This reveals the extent to which the Commission considered its statement in *WWIZ, Inc.* in relation to the facts in this case. They are wholly inapposite because the *WWIZ, Inc.* case did not involve a supplemental record or a comparative hearing.

Section 405 and Section 1.106(c)(1), cited above may make this "plain" to the Commission but they can only do so if the decisions of this Court reversing the Commission for abuse of discretion under Section 405, *supra*, are wholly ignored as they were here. The authorities cited by the Commission concern appellate courts in the states, the federal circuits and the Supreme Court. They do not mention administrative agencies in general or the Commission's governing statute, Section 405. As the Supreme Court noted long ago in one of the leading cases on comparative hearings before the APA was enacted, administrative agencies are different from lower courts, the review function is different and it is necessary for all evidence to be considered and, if it is not, it is an abuse of discretion, *FCC v. Pottsville Broadcasting Co.*, *supra*. The Commission is not the Supreme Court, and citation to Supreme Court Rule 33(2) is grossly misleading. The rule concerns only reconsideration of denial of petitions for writ of certiorari. The right to comparative consideration by the Commission at all stages of a comparative hearing is in no respect analogous to the discretion in granting a writ of certiorari regardless of the differences in the forum, and the three cases cited by the Supreme Court in that Rule have nothing whatsoever to do with administrative process or administrative review. Two involve patent infringements and one is a criminal case in which a petitioner who had been convicted for conspiracy to violate the prohibition laws sought reconsideration of denial of his petition for certiorari subsequent to the ratification of the 21st Amendment.²⁰ The citation to *Corpus Juris Secundum* involves cases on rehearing in courts exclusively and does not refer to administrative agencies. Similarly, the law review article cited in the above quotation concerns itself only with appellate reconsideration, and it is based on a survey of the highest courts of the states, the Circuit Courts of Appeal and the Supreme Court

²⁰ Patent infringement cases: *Sanitary Refrigerator Co. v. Winters*, 280 U.S. 30, 34, Footnote 1 (1929); *Schriber-Schroth Co. v. Cleveland Trust Co.*, 305 U.S. 47, 50, 573 (1938); prohibition case: *Massey v. U.S.*, 291 U.S. 608 (1934).

only. The authors specifically restricted their article to appellate rehearing and explicitly stated that trial court devices for reexamination of decisions such as motions for new trials, judgments N.O.V. and the like, were not within the scope of the article, 44 Cal. L. Rev. 629, 632. *A fortiori*, agency rehearing and reconsideration was outside its scope. In short, the Commission presumes too much in comparing itself to appellate courts with regard to reconsideration. Its obligations on reconsideration to examine the whole record of a case are established by Section 405 and the decisions of this Court and the Supreme Court, not by the certiorari rule of the Supreme Court nor other practices of appellate courts in the Circuits and in the states.

The Commission's duty to reconsider and evaluate on a comparative basis the whole record including the evidence in the reopened hearing is clear from decisions of this Court construing Section 405 of the Act, *Enterprise Co. v. FCC*, *supra*; *W. S. Butterfield Theatres, Inc. v. FCC*, *supra*.

Subsequent to the first Commission decision in *Enterprise*, a contract was entered into providing for a merger of interests between two of the three applicants in the comparative hearing by granting an option to W. P. Hobby to acquire 32-1/2% of the stock in the victorious applicant, Beaumont Broadcasting Corporation, and the dismissal of the applicant in which Mr. Hobby had an interest, KTRM, Inc. The third applicant, Enterprise Company, sought reconsideration by the Commission in the light of this agreement because the option coupled with Mr. Hobby's ownership of newspapers and broadcast facilities in Houston, Texas, appeared to have an effect on the comparative basis of the Commission's decision in the case, the comparative criterion of diversification of mass media of communications. Here the situation is no different, only the criterion differs because the basis of the Commission's decision granting WTSP-TV was past broadcast record. On the "... whole record. . ." it is clear that this decisional preference for past broadcast record is unwarranted. As the Court noted in the *Enterprise*

case, the shift in the interests among the parties to the comparative proceedings [the "... determinative feature ..." of the comparative case in the view of the Commission] was a "... shift in the foundations. ..." ²¹ of the Commission's decision. So here, the extensive changes and downgrading of programming by the winning applicant and the *Enterprise* decision require reversal of this case without more. The Court in *Enterprise* was faced with the same arguments that the Commission relied on below, namely, that there must be an end to administrative proceedings, and the suggestion that once a comparative case is decided it ceases to be a comparative hearing. The Court described the nature of comparative hearings, and alluded to the fact that the changes proposed in the Hobby option:

... struck at the very basis which had been assigned by the Commission for its decision, and were disclosed at a time when the decision was still open for reconsideration. In these circumstances nothing in the language of Sections 310(b) or 405 deprived the Commission of power to receive the new evidence and to reconsider or redetermine the case on a comparative basis. If this is not done the advantages of the comparative hearing are lost and its purposes frustrated. Section 310(b), important as it is in the total scheme of the Act, is no substitute for the comparative procedures available to applicants for the same permit. *Id.*, 97 U.S. App. D.C. 378, 231 F.2d 712.

Here the Commission went part of the way required under *Enterprise* in that it ordered reopening of the record. The Commission did not, however, "... reconsider or redetermine the case on a comparative basis" and this it must do. That *Enterprise* involved the mass media criterion while this proceeding concerns the past broadcast criterion, makes no difference in the Commission's duty to reconsider on the whole record. *W. S. Butterfield Theatres, Inc. v. FCC, supra.*

²¹ *Id.* 97 U.S. App. D.C. 377, 231 F.2d 711.

It is recognized that the matter of Commission reconsideration is directed under Section 405 of the Act to the Commission's sound discretion; nevertheless, such discretion can be, and is, abused with some regularity by the Commission. See, e.g., *Enterprise Co. v. FCC*, *supra*; *W. S. Butterfield Theatres, Inc. v. FCC*, *supra*; *McClatchy Broadcasting Co. v. FCC*, *supra*; *WMOZ, Inc. v. FCC*, ___ U.S. App. D.C. ___, ___ F.2d ___ (Case No. 18,742, decided February 25, 1965); *Melody Music, Inc. v. FCC*, ___ U.S. App. D.C. ___, ___ F.2d ___ (Case No. 18,857, decided April 8, 1965). A number of these decisions make it absolutely clear that the Commission may not consider facts and allegations before it as if on demurrer. Yet the Commission has in effect done so here by wholly disregarding the record made on the reopened hearing insofar as it affects the comparative consideration among the applicants which would best serve the public interest, convenience and necessity. The "... technical demurrer approach. . ." by the Commission was rejected by this Court in *Clarksburg Publishing Co. v. FCC*, 96 U.S. App. D.C. 211, 215, 225 F.2d 511, 515 (1955). In *Clarksburg* this Court also noted that:

However unwittingly, the Commission seems to have assumed the defense of its grant, rather than the public interest, as its primary role in the proceedings.

So here the Commission has assumed the "... defense of its grant..." rather than the public interest as its primary role in this proceeding. That the public interest, convenience and necessity is the basic responsibility of the Commission has long been established. *FCC v. Pottsville Broadcasting Co.*, *supra*; *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945). The length of time that this case has been pending is no basis on which to disregard the requirements of Section 405, the requirements of comparative hearings and decisions of this court. Administrative finality is a relevant factor, but it cannot be permitted to justify violation of the Act by the Commission, see *Enterprise Co. v. FCC*, *supra*. The Commission does not have "... the congressional power of

repeal. . ." of the statute under which it was created and which circumscribes the limits within which the Commission may act. See *American Broadcasting-Paramount Theaters, Inc. v. FCC*, 113 U.S. App. D.C. 1, 6, 303 F.2d 766, 771 (1962), citing *Office Employees v. NLRB*, 353 U.S. 313, 320 (1957). Since it is the Commission's and everyone else's concern that a station soon commence operation on the channel here sought, it could well have fostered this result and comply with its responsibility on reconsideration to consider the whole record by setting aside the construction permit granted to WTSP-TV and ordering a further comparative hearing to bring the record down to date.²² Under these circumstances it is reasonable to expect that the applicants will propose a joint interim operation to activate a station pending completion of the hearing in accord with provisions of Section 1.592(b) of the Commission's Rules, 47 C.F.R. Section 1.592(b); see *American Broadcasting Co.*, 22 R.R. 407 (1961). Pursuant to this policy and the rule, television stations have been established and operate in various communities, e.g., Grand Rapids, Michigan, Rochester, New York and Syracuse, New York, on an interim basis while comparative hearings for permanent operation have proceeded.²³ To create the circumstances under which an interim operation could be established in Largo is clearly a matter for the Commission on remand. It would permit the Commission both to meet its concern that the public interest be served by the commencement of operation of a station while enabling the Commission to discharge its duty to consider the whole record on a comparative basis.

For all of the foregoing reasons, this Court must reverse the Commission because of its failure to reconsider the entire record of this

²² Cf. *WORZ, Inc. v. FCC*, ___ U.S. App. D.C. ___, ___ F.2d ___ (Case No. 18772, decided March 4, 1965).

²³ See *Grand Broadcasting Co. (WZZM-TV)*, 2 R.R. 2d 327, 335 (footnote 1) (1964); *Channel 9, Syracuse, Inc. (WNYS)*, FCC File No. BPCTI-2, granted April 12, 1962; *Channel 13 of Rochester, Inc. (WOKR)*, FCC File No. BPCTI-3, granted July 3, 1962.

proceeding on a comparative basis as it must do under applicable precedent. For this reason alone this case must be reversed.

III.

WTSP-TV Is Absolutely Disqualified or at Least Must Receive a Comparative Demerit for Misrepresentation to and Ex Parte Contacts With the Commission.

In addition to the Commission's failure to consider the reopened record on a comparative basis, the conclusion of the Commission that WTSP-TV possessed the character qualifications to be a licensee of the Commission is also error. At the very least, misrepresentations and *ex parte* contacts by WTSP-TV principals require a comparative demerit, not a comparative preference, for past broadcast record. The principals of WTSP-TV operate a number of radio stations in various parts of the country (23 R.R. 6, 71-72). At the time that the WTSP-TV application for Channel 10 station in Largo was pending before the Commission and on the approval of the WTSP-TV principals, extensive self laudatory brochures on the so-called public service activities of these stations were distributed to the members of the Commission and identical material was offered into evidence in the hearing. (T. 3057, 3062, 3065, 3112). The Commission concluded in the first decision that this obvious *ex parte* contact with the Commission was irrelevant and that it was overzealous public relations activity.²⁴ This is error under the decision of this Court in *WKAT, Inc. v. FCC*, 111 U.S. App. D.C. 253, 296 F.2d 375 (1961), cert. den. sub nom. *Public Service Television, Inc. v. FCC*, 368 U.S. 841 (1961).

Even if such *ex parte* contacts should not be absolutely disqualifying on the basis that the other applicants found out about it and forced admissions at the hearing, nevertheless, a comparative demerit must be assessed against WTSP-TV, and the construction permit granted to it

²⁴ *Florida Gulfcoast Broadcasters, Inc.*, 23 R.R. 1, 17 (ruling on Exception 39).

vacated. *Massachusetts Bay Telecasters, Inc. v. FCC*, 111 U.S. App. D.C. 144, 295 F.2d 131 (1961).

Other and equally serious derelictions of WTSP-TV principals are extensive errors and mistakes in the log keeping of the stations owned by the principals of WTSP-TV and admitted by them. Significantly, the classifications always improved the program percentages by, for example, making "recorded" programs "live," and by classifying "commercial" programs "sustaining," even though commercial spot announcements were contained within them (T. 2285-91, 2322-5, 2519-20, 2555-61, 2700, 2733-7, 2745-8).²⁵ And most seriously, one log keeping dereliction was falsification rather than carelessness. At one of the Rahall stations, pursuant to the order of the president of the station licensee, the program director added some eighty noncommercial spot announcements to the program logs for the 1957 composite week allegedly broadcast but not logged at the time of the broadcast; they were merely estimates, not based on any accurate records, not initialed or otherwise identified as an addition to the logs as required by Section 73.111(c) of the Commission's Rules, 47 C.F.R. Section 73.111(c), even though they were made in some cases more than a year after the time of the supposed broadcast (T. 2308-9, 2369). See *Spartan Radiocasting Co.*, 21 R.R. 101 (1962); *WWIZ, Inc.*, 2 R.R. 2d 169 (1964). The Commission whitewashed all these derelictions with the statement that ". . . our study of the record evidence convinces us that none of these criticisms seriously detracts from WTSP-TV's generally good past record." (32 F.C.C. 197, 206, 23 R.R. 1, 12). And, quite incredibly, ". . . there is no evidence of an attempt to mislead the Commission as to the true

²⁵ This is a matter of current interest to a division of this court in another appeal from an FCC decision. See *per curiam* order dated April 8, 1965 in *South Florida Television Corporation v. FCC*, Case Nos. 18,873 and 18,880.

nature of the licensee's performance."²⁶ (*Id.*) Obviously the adding of noncommercial spots to program logs one and a half years after broadcast can be nothing else but this. No memory could retain the data required by the logs for any one spot for even a week, much less for over a year. There is no rational basis to justify the Commission's findings that these people possess character qualifications to be a licensee, much less that they should win a comparative hearing with such factors established upon the record. It is utterly incomprehensible that the Commission would whitewash and ignore such serious derelictions and then, on the other hand, in other contexts demonstrate their interest in the importance of correct log keeping and candor with the Commission by denying renewal of licenses of other stations, see *WWIZ, Inc., supra*. The case must be reversed at the very least so that the Commission may explain the basis for the distinction between their treatment of the Rahalls' log falsifications in this case and their treatment of such derelictions in other cases, see *Melody Music, Inc. v. FCC*, ___ U.S. App. D.C. ___, ___ F.2d ___ (Case No. 18,587, decided April 8, 1965). Again, it is noted that it is because of its past broadcast record that WTSP-TV received a "... significant preference. . ." in this comparative case when it should have received a comparative demerit. A mere statement of this fact against the evidence of record indicates that the Commission could not possibly have discharged its responsibilities to weigh all of the evidence in the whole record under the doctrine of *Universal Camera Corp. v. NLRB, supra*, and *NLRB v. Pittsburgh Steamship Co., supra*.

Furthermore, there appears to be no real qualitative difference in the Rahalls' dishonest log keeping and the misrepresentations to the

²⁶ For a contrary view by members of the Commission itself, see the dissenting statement of Commissioner Bartley, in which Chairman Minow joined, to the first decision, 32 F.C.C. 197, 215-217, 23 R.R. 1, 25-27 (1962); and Commissioner Bartley's dissent to the second decision, Chairman Minow having resigned, 37 F.C.C. 833, 853-855, 4 R.R. 2d 1, 24-26 (1964).

Commission arising out of it than there was in the misrepresentations to the Commission which have led to denials of renewals and revocations of licenses in other recent proceedings. See, e.g., *Eleven Ten Broadcasting Corp.*, 22 R.R. 699 (1962), affirmed sub nom. *Immaculate Conception Church of Los Angeles v. FCC*, 116 U.S. App. D.C. 73, 320 F.2d 795 (1963), cert. denied, 375 U.S. 904 (1963); *KWK Radio, Inc.*, 25 R.R. 577 (1963), affirmed in *KWK Radio, Inc. v. FCC*, ___ U.S. App. D.C. ___, 337 F.2d 540 (1964), cert. denied, 13 L. Ed. 2d 798 (1965); *Palmetto Broadcasting Co.*, 23 R.R. 483 (1962), affirmed sub nom. *Robinson v. FCC*, ___ U.S. App. D.C. ___, 334 F.2d 534 (1964), cert. denied, 13 L. Ed. 2d 49 (1964); *WWIZ, Inc.*, 37 F.C.C. 685, 3 R.R. 2d 316 (1964). The misrepresentation of the Rahalls to the Commission is every bit as serious as the foregoing cases and clearly there is no basis to find them the preferred party in an important comparative hearing on the basis of past programming, a matter of great importance to the Commission and to the courts. *Pinellas Broadcasting Co. v. FCC*, *supra*; *St. Louis Telecast, Inc.*, *supra*.

CONCLUSION

It is respectfully submitted that several independent grounds for reversal have been presented, *supra*. The Commission has decided this case on the basis of comparative criteria which are arbitrary and capricious and the case should be remanded to the Commission with instructions to develop and apply comparative criteria which it can demonstrate are rationally related to the statutory public interest standard. The Commission has committed procedural error which requires reversal in failing to make and substantiate a comparative determination on the basis of the entire record including the record in the remand proceeding. Assuming *arguendo* that the Commission's existing comparative criteria are valid, the Commission has committed substantive error in its failure to downgrade WTSP-TV under the criterion of broadcast record, a conclusion which is required under the evidence developed in the remand proceeding, and its failure to downgrade or

disqualify WTSP-TV for misrepresentations to and *ex parte* contacts with the Commission.

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APPENDIX A

The following are the pertinent portions of statutes and rules relevant to the instant case.

COMMUNICATIONS ACT OF 1934, AS AMENDED, ACT OF JUNE 19, 1934, (48 STAT. 1064), 47 U.S.C. SEC. 151, *et seq.*

Sec. 307(a) (47 U.S.C. Sec. 307(a)) The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this chapter, shall grant to any applicant therefor a station license provided for by this chapter.

Sec. 402(b)(1) (47 U.S.C. Sec. 402(b)(1)) Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

By any applicant for a construction permit or station license, whose application is denied by the Commission.

Sec. 405 (47 U.S.C. Sec. 405) (in part) After an order, decision, report, or action has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission pursuant to a delegation under section 155(d)(1) of this title, any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for rehearing only to the authority making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 155(d)(1) of this title, in its discretion, to grant such a rehearing if sufficient reason therefor be made to appear. . . . The Commission, or designated authority within the Commission, shall enter an order, with a concise statement of the reasons therefor, denying a petition for rehearing or granting such petition, in whole or in part, and ordering such further proceedings as may be appropriate: . . . Re-

hearings shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding shall be taken on any rehearing

ADMINISTRATIVE PROCEDURE ACT, AS AMENDED, ACT OF JUNE 11, 1946 (60 STAT. 237) 5 U.S.C. SEC. 1001, *et seq.*

Sec. 7(c) (5 U.S.C. Sec. 1006(c)) Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. . . .

Sec. 10(e) (5 U.S.C. Sec. 1009(e)) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing de-

terminations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

RULES AND REGULATIONS OF THE FEDERAL COMMUNICATIONS COMMISSION

Sec. 1.592(b) (47 C.F.R. Sec. 1.592(b)) When two or more applications for the same television assignment have been designated for hearing, the Commission may, if the public interest will be served thereby, make a conditional grant to a group composed of any two or more of the competing applicants, such grant to terminate when the successful applicant commences operation under the terms of a regular authorization. No conditional grant will be made unless all of the competing applicants have been afforded a reasonable opportunity to participate in the group seeking the conditional grant. In its application, the group shall include a special showing as to the need for the service pending operation by the successful applicant under the terms of a regular authorization; the effect, if any, of a grant on the position of any applicant which is not a member of the group; and any other factors which are deemed pertinent to the public interest judgment.

APPENDIX B

Television Program Promise and Performance Survey

Attached is a table showing percentages of time devoted to various categories of programming: 1) as promised in applications for construction permits by successful applicants and 2) as shown in renewal applications as performance during a composite week of operations using dates selected by the Commission for this purpose. It is a survey of 35 cases where a construction permit was awarded by the Commission after a comparative hearing *and* where the winning applicant thereafter filed one or more renewal applications. Since the lifting of the television freeze in 1952 there have been numerous comparative television hearings as to which data are not included in the attached table for one of the following reasons: 1) the television station was sold prior to the filing of any renewal application; 2) no exceptions were taken to the Commission from the decision of the Hearing Examiner or the case was settled without any decision by the full Commission; 3) the decision was made relatively recently and a renewal application has not yet been filed; 4) a renewal application has never been filed because the station never commenced operations or never received an initial license; 5) the station is a noncommercial educational television station; and 6) in one case, the renewal application was based upon only four months of operations.

Below is a list of the six cases where the television station was sold by the winning applicant prior to the filing of any renewal application:

<u>Call Letters and Station Location</u>	<u>Date of Citation of Commission Decision</u>	<u>Date of Commission Approval of Sale</u>
KFRE Fresno, Calif.	1/12/56 11 R.R. 257	12/30/58
KLZ Denver, Colo.	6/26/53 9 R.R. 1	6/23/54
KXTV Sacramento, Calif.	9/29/54 9 R.R. 1190	12/23/58
WBIR Knoxville, Tenn.	1/13/56 11 R.R. 985	1/4/60
WTPA Harrisburg, Pa.	7/24/53 9 R.R. 465	5/15/57
WTVT Tampa, Fla.	9/2/54 10 R.R. 77	7/18/56

Below is a comparison of the average of the promises and performance of all 35 winning applicants surveyed:

<u>Program Category</u>	<u>Average of Promises</u>	<u>Average of Performances</u>
Entertainment	64.7%	75.1%
Religious	3.5	2.2
Agricultural	3.2	1.5
Educational	4.6	3.1
News	7.6	6.2
Discussion	4.0	1.7
Talks	11.7	8.8
Other	0.7	1.4
	<u>100.0%</u>	<u>100.0%</u>
Local Live	31.5%	11.8%

The winning applicants in the following cases received a preference under the criteria of local residence, civic participation and/or diversity of business interests: KARD, KATV, KETV, KOSA, KPTV, KSLA, KTBS, WAVY, WKBW, WKRG, WPSD, WRVA, WSAV, WSOC, WTEN, WTIC (16). A comparison of the average of the promises and performance of these applicants is as follows:

<u>Program Category</u>	<u>Average of Promises</u>	<u>Average of Performances</u>
Entertainment	63.3%	76.1%
Religious	3.9	2.3
Agricultural	3.3	1.3
Educational	5.0	3.1
News	7.8	6.0
Discussion	3.9	1.5
Talks	11.9	8.6
Other	0.9	1.1
	<u>100.0%</u>	<u>100.0%</u>
Local Live	31.9%	11.1%

The winning applicants in the following cases received a preference under the criteria of broadcast experience and/or past broadcast record: KATV, KCRA, KIRO, KMOX, KOSA, KTVU, WAVY, WHDH, WKBW,

WPSD, WRCB, WREC, WRVA, WSAV, WSOC, WTEN, WTIC, WTOM, WWL (19). A comparison of the promises and performance of these applicants is as follows:

<u>Program Category</u>	<u>Average of Promises</u>	<u>Average of Performances</u>
Entertainment	66.4%	75.8%
Religious	3.3	2.1
Agricultural	2.5	1.2
Educational	4.3	3.2
News	7.7	6.2
Discussion	3.7	1.8
Talks	10.8	7.9
Other	1.3	1.8
	<u>100.0%</u>	<u>100.0%</u>
Local Live	28.4%	12.0%

The winning applicants in the following cases received a preference under the criterion of integration of ownership and management: KIRO, KSLA, KTBS, KTVU, KZTV, WFGA, WHDH, WJRT, WKRG, WPSD, WRAL, WREC, WRVA, WSAV, WSOC, WYCB (16). A comparison of the promises and performances of these applicants is as follows:

<u>Program Category</u>	<u>Average of Promises</u>	<u>Average of Performances</u>
Entertainment	64.8%	76.1%
Religious	3.8	2.3
Agricultural	3.2	1.3
Educational	4.6	2.8
News	8.1	5.7
Discussion	3.9	1.3
Talks	10.5	9.1
Other	1.1	1.4
	<u>100.0%</u>	<u>100.0%</u>
Local Live	32.4%	11.2%

The winning applicants in the following cases received a preference under the criterion of diversification of mass media of communication: KARD, KETV, KPTV, KSLA, KTBS, KZTV, WCYB, WILX, WISC, WKRG,

TABLE COMPARING PROMISES AND PERFORMANCE
FOR 35 TELEVISION APPLICANTS WHO WERE
PREFERRED IN A COMPARATIVE HEARING

<u>Application</u>	<u>Program Categories</u> ¹								<u>Tot.</u>	<u>LL</u>
	<u>E</u>	<u>R</u>	<u>A</u>	<u>Ed.</u>	<u>N</u>	<u>D</u>	<u>T</u>	<u>O</u>		
<u>Station WJRT, Flint, Michigan</u>										
CP ² 16 R.R. 321 (1958)	69.6	4.3	2.5	4.1	7.5	4.1	7.9	-	100	33.5
Renewal filed 1961	72.0	3.0	1.1	4.3	6.0	2.2	11.4	-	100	21.5
Renewal filed 1964	75.6	3.2	1.6	4.2	6.6	1.3	7.5	-	100	15.1
<u>Station KPTV, Portland, Oregon</u>										
CP 9 R.R. 1401 (1954)	64.9	3.8	3.3	6.5	5.8	1.5	14.2	-	100	45.2
Renewal filed 1956	69.5	3.6	3.0	5.6	6.1	.3	11.0	.9	100	12.3
<u>Station WFLA, St. Petersburg, Florida</u> ³										
CP 9 R.R. 719 (1954)	65.4	4.6	4.6	4.9	6.7	5.4	8.4	-	100	43.8
Renewal filed 1957	68.9	2.6	3.2	2.5	7.8	1.6	12.7	.7	100	24.2
Renewal filed 1960	76.2	1.5	.7	-	12.5	-	.3	8.8	100	26.0
Renewal filed 1963	74.0	1.9	1.6	2.5	12.7	2.3	.6	4.4	100	16.2
<u>Station WXEX, Petersburg, Virginia</u>										
CP 10 R.R. 567 (1954)	63.6	3.1	5.4	3.5	9.3	3.0	12.1	-	100	19.2
Renewal filed 1957	70.5	3.5	3.7	2.5	9.4	3.1	7.3	-	100	10.6
Renewal filed 1960	79.2	2.4	2.3	1.7	5.1	3.8	5.5	-	100	6.2
Renewal filed 1963	73.7	3.2	2.5	2.2	7.6	2.8	7.9	.1	100	11.5
<u>Station WSAV, Savannah, Georgia</u>										
CP 10 R.R. 402 (1955)	66.6	6.0	.7	7.8	7.1	4.8	2.2	4.8	100	23.1
Renewal filed 1957	74.4	2.8	1.8	1.8	3.3	1.3	13.2	1.4	100	10.1
Renewal filed 1960	75.0	1.7	1.2	1.2	3.3	1.6	13.8	2.2	100	10.9
Renewal filed 1963	69.1	2.3	1.3	3.1	7.8	1.4	2.8	12.2	100	9.2

¹ Given in percentages: E - Entertainment; R - Religious; A - Agricultural; Ed. - Educational; N - News; D - Discussion; T - Talks; O - Other; Tot. - Total; LL - Local Live

² Construction Permit, citation is to F.C.C. comparative decision. In some instances, applicants promised different percentages depending on whether they would be network affiliates or not. In each case, we used whichever set of promises turned out to be applicable.

³ 1960 renewal not reflected in the statistics because the applicant indicated that the composite week filed with this renewal was not typical.

WRAL, WRVA, WWL (13). A comparison of the promises and performances of these applicants is as follows:

<u>Program Category</u>	<u>Average of Promises</u>	<u>Average of Performances</u>
Entertainment	62.8%	76.5%
Religious	3.7	2.1
Agricultural	4.0	1.6
Educational	5.1	3.1
News	7.5	5.7
Discussion	3.8	1.4
Talks	12.8	9.2
Other	0.3	0.4
	<u>100.0%</u>	<u>100.0%</u>
Local Live	33.7%	9.9%

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<u>Application</u>	<u>E</u>	<u>R</u>	<u>A</u>	<u>Ed.</u>	<u>N</u>	<u>D</u>	<u>T</u>	<u>O</u>	<u>Tot.</u>	<u>LL</u>
<u>Program Categories</u>										
<u>STATION KTBS, Shreveport, Louisiana</u>										
CP 10 R.R. 811 (1955)	55.0	5.0	4.0	6.0	11.0	4.0	15.0	-	100	30.0
Renewal filed 1958	77.0	2.3	.9	1.1	4.8	1.7	12.2	-	100	3.6
Renewal filed 1961	77.7	1.0	1.2	3.5	4.7	.2	11.7	-	100	7.1
Renewal filed 1964	77.8	1.9	1.5	.4	7.8	.9	9.7	-	100	11.8
<u>Station WKRG, Mobile, Alabama</u>										
CP 10 R.R. 225 (1955)	68.9	2.7	3.5	4.0	7.7	3.0	10.2	-	100	32.0
Renewal filed 1957	89.4	.7	.4	.6	4.6	1.3	3.0	-	100	11.0
<u>Station KCRA, Sacramento, California</u>										
CP 10 R.R. 615 (1955)	69.6	2.4	1.7	2.0	7.9	2.4	14.0	-	100	26.0
Renewal filed 1959	86.1	1.3	.7	1.2	3.1	3.0	4.6	-	100	7.7
Renewal filed 1962	76.0	1.5	.9	4.2	6.6	2.8	8.0	-	100	9.2
<u>Station KSLA, Shreveport, Louisiana</u>										
CP 10 R.R. 699 (1955)	60.0	4.5	2.5	3.1	6.9	5.7	17.3	-	100	26.0
Renewal filed 1958	79.8	4.2	2.3	2.2	3.9	1.3	6.3	-	100	9.9
<u>Station WREC, Memphis, Tennessee</u>										
CP 10 R.R. 1323 (1955)	71.3	2.0	2.2	3.4	8.3	3.2	9.6	-	100	25.0
Renewal filed 1958	87.1	1.4	.3	1.2	4.0	.8	5.0	-	100	3.1
Renewal filed 1961	75.3	1.9	.8	1.0	4.9	.8	15.3	-	100	8.1
<u>Station KARD, Wichita, Kansas</u>										
CP 11 R.R. 1 (1955)	53.7	3.5	5.2	8.1	9.9	5.3	14.3	-	100	48.0
Renewal filed 1959	74.2	2.6	1.5	2.8	7.9	1.9	9.1	-	100	16.8
Renewal filed 1962	68.8	2.2	1.7	4.5	11.0	.4	11.4	-	100	16.7
<u>Station KGW, Portland, Oregon</u>										
CP 10 R.R. 878 (1955)	58.3	4.1	2.1	5.2	5.1	6.3	18.9	-	100	48.4
Renewal filed 1959	68.6	3.6	1.4	4.7	6.0	3.1	12.6	-	100	24.3
Renewal filed 1962	60.4	2.9	1.1	6.4	7.2	2.3	19.7	-	100	15.8
<u>Station KOSA, Odessa, Texas</u>										
CP 11 R.R. 755 (1955)	69.8	2.6	1.9	3.7	7.3	3.2	11.5	-	100	36.9
Renewal filed 1959	71.3	2.7	.5	1.7	5.9	4.7	11.8	-	100	15.3
<u>Station WRVA, Richmond, Virginia</u>										
CP 11 R.R. 1234 (1955)	67.7	4.5	3.8	3.2	5.8	2.4	9.0	3.6	100	29.9
Renewal filed 1960	81.7	3.2	1.2	2.0	5.0	1.0	5.5	.4	100	8.6
Renewal filed 1963	73.2	2.3	1.1	7.6	5.8	.6	9.4	-	100	16.6
<u>Station WISC, Madison, Wisconsin</u>										
CP 10 R.R. 1224 (1955)	61.7	2.4	8.0	5.0	6.3	5.3	11.3	-	100	28.8
Renewal filed 1958	80.7	1.4	4.0	2.3	3.7	2.1	5.8	-	100	5.8
Renewal filed 1961	71.4	1.4	4.3	2.4	6.2	2.6	10.7	1.0	100	11.1
Renewal filed 1964	74.9	1.9	3.3	2.9	7.5	1.3	7.2	1.0	100	10.8

<u>Application</u>	<u>E</u>	<u>R</u>	<u>A</u>	<u>Ed.</u>	<u>N</u>	<u>D</u>	<u>T</u>	<u>O</u>	<u>Tot.</u>	<u>LL</u>
<u>Program Categories</u>										
<u>Station WRCB, Chattanooga, Tennessee</u>										
CP 10 R.R. 1119 (1956)	70.4	3.0	2.0	2.8	5.4	10.4	6.0	-	100	26.0
Renewal filed 1958	86.0	1.7	-	.9	2.1	1.3	8.0	-	100	10.2
<u>Station WCYB, Bristol, Virginia</u>										
CP 11 R.R. 1327 (1956)	75.5	3.6	2.8	3.9	8.0	2.6	3.6	-	100	33.8
Renewal filed 1960	85.2	1.3	-	2.7	3.4	-	5.7	1.7	100	4.9
Renewal filed 1963	72.2	4.3	.7	5.0	6.9	.6	9.4	.9	100	8.4
<u>Station KETV, Omaha, Nebraska</u>										
CP 12 R.R. 317 (1956)	59.6	3.6	6.7	5.0	9.7	4.6	10.8	-	100	41.1
Renewal filed 1959	88.0	2.1	.6	.6	2.2	-	6.5	-	100	7.6
Renewal filed 1962	80.8	1.9	1.5	1.3	3.3	2.4	8.8	-	100	5.4
<u>Station WAVY, Portsmouth, Virginia</u>										
CP 11 R.R. 939 (1956)	50.8	4.3	4.2	4.2	6.2	5.3	22.8	2.2	100	36.3
Renewal filed 1960	86.3	.5	-	2.3	5.7	1.7	3.5	-	100	7.7
Renewal filed 1963	66.5	2.2	2.2	4.9	7.9	3.5	12.8	-	100	15.5
<u>Station WRAL, Raleigh, North Carolina</u>										
CP 12 R.R. 609 (1956)	56.6	4.1	6.5	8.5	8.1	5.3	10.9	-	100	39.7
Renewal filed 1960	73.5	1.6	2.1	4.8	5.1	.8	12.1	-	100	13.8
Renewal filed 1963	72.7	2.9	2.5	2.7	6.3	1.7	6.6	4.6	100	10.9
<u>Station WWL, New Orleans, Louisiana ⁴</u>										
CP 12 R.R. 1017 (1956)	65.7	2.4	1.4	5.6	7.3	1.9	15.7	-	100	24.3
Renewal filed 1961	77.1	.2	.6	3.9	6.2	2.8	9.2	-	100	11.6
Renewal filed 1964	75.6	1.6	1.4	6.0	7.6	3.1	5.3	-	100.6	17.3
<u>Station KZTV, Corpus Christi, Texas</u>										
CP 11 R.R. 1173 (1956)	62.4	4.0	3.2	4.8	9.0	4.5	12.1	-	100	30.3
Renewal filed 1959	78.5	2.1	1.3	2.4	4.6	2.0	9.1	-	100	6.2
Renewal filed 1962	80.9	.9	.7	2.2	6.0	.8	8.5	-	100	3.7
<u>Station WTIC, Hartford, Connecticut</u>										
CP 12 R.R. 689 (1956)	55.7	3.6	2.5	9.0	12.4	3.5	9.7	3.6	100	23.2
Renewal filed 1959	79.3	1.8	.4	4.8	4.8	1.0	6.7	1.2	100	10.1
Renewal filed 1962	74.1	2.0	.7	10.4	6.0	.5	5.9	.4	100	13.6
<u>Station WFGA, Jacksonville, Florida</u>										
CP 12 R.R. 113 (1956)	61.3	3.4	2.9	5.9	7.7	5.2	13.6	-	100	36.6
Renewal filed 1957	70.5	3.4	1.8	4.6	6.4	1.4	11.9	-	100	17.4
Renewal filed 1960	73.5	2.1	1.7	3.8	6.3	.4	10.5	1.7	100	11.2
Renewal filed 1963	67.7	2.3	2.5	3.1	8.7	1.0	13.7	1.0	100	16.4

⁴ 1964 renewal figures, taken from renewal application, do not add to 100%.

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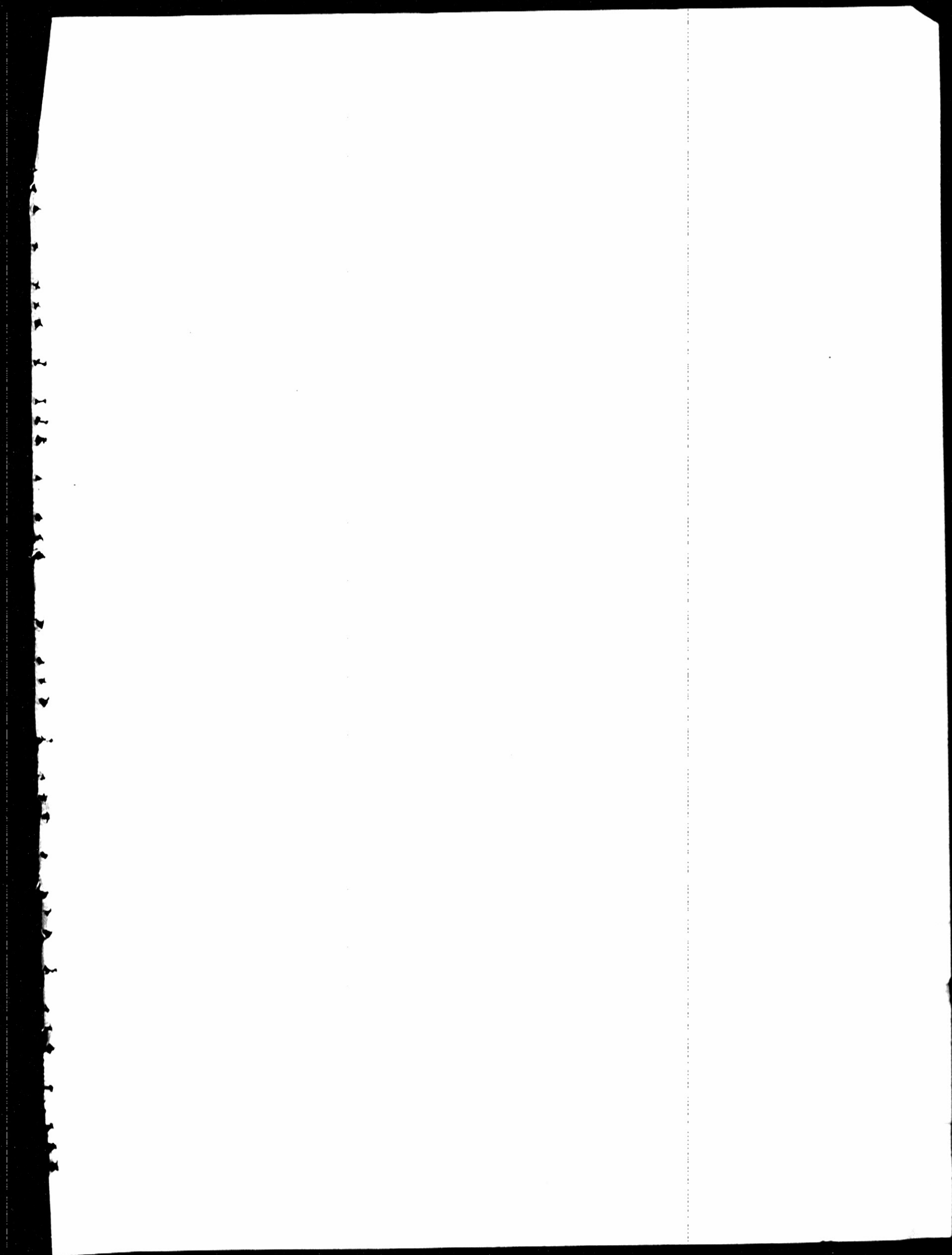
<u>Application</u>	<u>E</u>	<u>R</u>	<u>A</u>	<u>Ed.</u>	<u>N</u>	<u>D</u>	<u>T</u>	<u>O</u>	<u>Tot.</u>	<u>LL</u>
<u>Program Categories</u>										
<u>Station WPSD, Paducah, Kentucky</u>										
CP 12 R.R. 509 (1956)	70.4	3.4	5.5	3.1	7.9	2.5	7.2	-	100	22.2
Renewal filed 1958	72.7	1.5	1.1	3.0	6.5	2.6	12.6	-	100	10.0
Renewal filed 1961	72.6	2.7	1.5	3.1	6.3	3.0	10.8	-	100	10.4
Renewal filed 1964	69.4	3.6	1.1	3.3	13.9	2.7	6.0	-	100	10.4
<u>Station WSOC, Charlotte, North Carolina</u>										
CP 12 R.R. 953 (1956)	68.6	2.9	2.6	4.8	6.1	4.8	10.2	-	100	31.1
Renewal filed 1957	85.1	1.8	.4	-	4.8	1.3	6.6	-	100	5.1
<u>Station KMOX, St. Louis, Missouri ⁵</u>										
CP 12 R.R. 1289 (1957)	71.0	2.0	4.0	5.0	8.0	2.5	5.0	2.5	100	23.0
Renewal filed 1958	77.4	2.4	3.0	2.1	5.2	2.4	3.2	4.3	100	17.7
Renewal filed 1961	73.6	2.8	2.2	4.6	7.9	2.7	1.5	4.7	100	17.0
Renewal filed 1964	67.9	3.1	2.1	6.6	12.0	2.0	2.0	4.3	100	17.0
<u>Station WHDH, Boston, Massachusetts ⁶</u>										
CP 13 R.R. 507 (1957)	55.3	3.5	2.6	2.9	12.3	2.8	12.9	7.7	100	65.0
Renewal filed 1962	68.1	3.6	1.9	5.5	5.5	2.2	8.9	4.3	100	22.1
<u>Station KTVU, Oakland, California</u>										
CP 14 R.R. 1 (1957)	68.2	3.7	.8	4.6	7.4	3.1	12.2	-	100	24.9
Renewal filed 1961	79.7	1.2	.4	1.1	1.6	3.7	6.1	6.2	100	18.9
<u>Station KIRO, Seattle, Washington</u>										
CP 15 R.R. 645 (1959)	67.8	3.0	2.3	3.1	6.8	3.6	13.4	-	100	30.1
Renewal filed 1959	77.9	1.7	1.5	2.1	7.0	.4	6.1	3.3	100	12.7
Renewal filed 1962	73.4	2.0	1.2	2.4	5.6	.8	12.5	3.1	100	19.2
<u>Station WTOM, Cheyboygan, Michigan</u>										
CP 15 R.R. 479 (1958)	72.5	2.4	1.8	4.2	8.0	2.8	8.3	-	100	7.8
Renewal filed 1961	72.0	2.0	1.0	2.0	10.0	1.0	12.0	-	100	4.0
Renewal filed 1964	75.0	2.0	1.0	1.0	10.0	1.0	10.0	-	100	3.0

⁵ For this station, a comparison was made of the promises made by the victorious applicant in a comparative hearing for Channel 11 in St. Louis with the performance of that applicant in renewal applications for a Channel 4 station which it purchased upon sale of its Channel 11 construction permit.

⁶ The "promise" figures utilized are an average of promises for "summer" and "winter."

<u>Application</u>	<u>E</u>	<u>R</u>	<u>A</u>	<u>Ed.</u>	<u>N</u>	<u>D</u>	<u>T</u>	<u>O</u>	<u>Tot.</u>	<u>LL</u>
<u>Program Categories</u>										
<u>Station WKBW, Buffalo, New York</u>										
CP 13 R.R. 669 (1958)	62.6	4.0	1.7	3.1	7.4	5.5	15.7	-	100	37.2
Renewal filed 1960	80.6	1.1	1.3	.9	3.1	.5	12.5	-	100	10.8
<u>Station WILX, Onondaga, Michigan ⁷</u>										
CP 16 R.R. 501 (1958)	64.4	4.0	.8	2.3	2.7	3.0	22.8	-	100	29.3
Renewal filed 1961	69.7	1.2	.3	2.4	4.1	2.8	19.5	-	100	7.9
Renewal filed 1964	62.9	2.2	.3	4.0	6.3	1.7	16.9	5.7	100	8.9
<u>Station WTEN, Vail Mills, New York</u>										
CP 19 R.R. 339 (1960)	76.2	2.8	1.0	2.7	5.6	3.2	8.5	-	100	13.4
Renewal filed 1963	72.1	3.3	.2	7.4	5.9	1.0	.2	9.9	100	9.9
<u>Station KATU, Portland, Oregon</u>										
CP 19 R.R. 997 (1961)	62.1	4.5	4.3	5.6	8.5	3.2	11.8	-	100	32.8
Renewal filed 1962	68.6	4.2	4.0	3.2	9.1	1.3	9.6	-	100	22.7

⁷ WILX - figures represent only the commercial station and do not reflect the programming of WMBS, an educational station with which air time is shared.



BRIEF FOR APPELLANT in No. 19,175

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,048

FLORIDA GULFCOAST BROADCASTERS, INC.,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
WTSP-TV, INC.,

Appellee,
Intervenor.

No. 19,172

SUNCOAST CITIES BROADCASTING CORP.,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
WTSP-TV, INC.,

Appellee,
Intervenor.

No. 19,175

TAMPA TELECASTERS, INC.,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
WTSP-TV, INC.,

Appellee,
Intervenor.

On Consolidated Appeals from a Decision of the
Federal Communications Commission

United States Court of Appeals
for the District of Columbia Circuit

FILED APR 26 1965

Nathan J. Paulson
CLERK

April 16, 1965.

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Attorneys for
Tampa Telecasters, Inc.

(i)

STATEMENT OF QUESTIONS PRESENTED

The parties have stipulated that the following questions are presented in this appeal:

1. Whether in the remand hearing in this proceeding the Commission committed error in the following respects:

- a) In failing to conclude that the evidence in the remand hearing required the withdrawal of the "significant preference" for past broadcast record awarded to the winning applicant (WTSP-TV) in the original hearing; and
- b) In refusing to reevaluate all applicants for a new television station license for Channel 10 at Largo, Florida, on a comparative basis in light of the entire record in this proceeding.

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* Cases principally relied upon are marked by asterisks.

United States Court of Appeals

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On Consolidated Appeals from a Decision of the
Federal Communications Commission

BRIEF FOR APPELLANT
in No. 19,175

JURISDICTIONAL STATEMENT

Case No. 19,048 is an appeal from a decision and an order of the Federal Communications Commission ("Commission") released January 19, 1962 (R. 4810-4838), denying the mutually exclusive applications of Florida Gulfcoast Broadcasters, Inc. ("Gulfcoast"), Suncoast Cities Broadcasting Corp. ("Suncoast"), Tampa Telecasters, Inc. ("Tampa") for a construction permit for a new television station to operate on Channel 10, Tampa-St. Petersburg, Florida and granting the mutually exclusive application of WTSP-TV, Inc. (WTSP-TV) and from the Commission's decision released November 6, 1964 (R. 6208-6236) denying petitions for reconsideration filed by Gulfcoast, Suncoast and Tampa and affirming the grant of the application of WTSP-TV. Case Nos. 19,172 and 19,175 are appeals from the above described actions and also from the Commission's Memorandum Opinion and Order released January 13, 1965 (R. 6261-6262) denying petitions for reconsideration of the November 6, 1964 Decision filed by Tampa and Suncoast.

These appeals are taken pursuant to Section 402(b) of the Communications Act of 1934 as amended (47 U.S.C. Section 402(b)).

STATEMENT OF THE CASE

Mutually exclusive applications for a new television station to operate on Channel 10 at Tampa-St. Petersburg, Florida¹ were filed by Gulfcoast (R. 1-86), Suncoast (R. 7486-7609), Tampa (R. 8215-8297), by intervenor WTSP-TV (R. 8966-9105), as well as by two other applicants who have elected not to appeal, City of St. Petersburg, Florida (R. 6263-6463), and Bay Area Telecasting Corporation (R. 10057-10189). By order released May 27, 1958, the Commission designated these six

¹ For technical reasons all of the applicants specified the nearby community of Largo as the station location.

applications for consolidated hearing (R. 288-290). Insofar as here pertinent the hearing issues specified in the Commission's order were its standard comparative issues under which the Commission chooses between mutually exclusive applications for the same facility:

To determine on a comparative basis which of the operations proposed in the above-captioned applications would best serve the public interest, convenience and necessity in light of the record made with respect to the significant differences among the applicants as to:

- a. The background and experience of each having a bearing on its ability to own and operate the proposed television broadcast station.
- b. The proposals of each with respect to the management and operation of the proposed television broadcast stations.
- c. The programming service proposed in each of the above-captioned applications.

Public hearings in the above-described proceeding were held commencing on January 5, 1959 and the record was closed on May 16, 1960. On February 1, 1961, the hearing examiner released an Initial Decision (R. 4556-4689), looking toward grant of the application of WTSP-TV and denial of the other applications in the proceeding, including that of Tampa. Exceptions to the Initial Decision together with briefs in support thereof and replies to exceptions were duly filed by the applicants. The case came on for oral argument before the Commission, sitting *en banc*, on July 13, 1961. On January 19, 1962, the Commission released a decision (R. 4810-4838) affirming the grant to WTSP-TV and the denial of the other applications. On February 19, 1962 petitions for reconsideration of the Commission's January 19, 1962 Decision were filed by all of the applicants except Bay Area Telecasting Corporation. The petitions filed by Gulfcoast and the City of St. Petersburg also requested that the record be reopened. By Memorandum Opinion and Order, released June 29, 1962 (R. 5044-5048), the Commission stayed its grant of a construction permit to WTSP-TV and

denied the petitions to reopen the record as untimely, but on its own motion reopened the record and remanded the proceedings to the Hearing Examiner for further hearing on the following issues:

1. To determine the nature of the programming service rendered by Station WLCY since the close of the record herein on May 16, 1960, and the extent to which such service differs from that relied upon by WTSP-TV at the earlier hearing herein.
2. To determine the reasons underlying (a) the choice of programming service of Station WLCY relied upon by WTSP-TV at the earlier hearing herein; and, (b) the choice of programming service of that station since May 16, 1960.
3. To determine, in the light of the facts developed under the foregoing issues (a) whether WTSP-TV, Inc. possesses the requisite character qualifications to be a licensee of the Commission; and, (b) whether, and in what respects, modification of the Commission's Decision in this proceeding is required.

The evidentiary hearing on remand was commenced on November 30, 1962, and the record was closed on April 4, 1963. On August 30, 1963, the Hearing Examiner released a Supplemental Initial Decision (R. 6016-6081) recommending affirmance of the grant of the application of WTSP-TV. Exceptions were taken by all parties to the proceedings and oral argument was held before the Commission *en banc* on April 27, 1964. On November 6, 1964, the Commission released its further Decision in the matter (R. 6208-6236) affirming the Hearing Examiner's Supplemental Initial Decision, vacating the stay order imposed on the construction permit issued to WTSP-TV, and denying the petitions for reconsideration which had been filed on February 19, 1962. Petitions for reconsideration of the November 6, 1964 Decision were filed by Tampa (R. 8947-8953) and Gulfcoast (R. 8204-8209). These petitions were denied by the Commission's Memorandum Opinion and Order of January 13, 1965 (R. 6261-6262).

a. The First Initial Decision

The Examiner found that WTSP-TV was a corporation with 28 prospective stockholders, but in which three brothers, Sam G., N. Joe and Farris E. Rahall, would own in excess of 72% of the stock. The Rahall brothers, at the time of the hearing, were principal stockholders in five radio stations, including station WTSP (call letters later changed to WLCY) in St. Petersburg. WTSP-TV introduced evidence concerning the past operation of the Rahall radio stations, including particularly WTSP, and the Examiner made extensive findings in this area.

In assessing the comparative qualifications of the applicants, the Examiner concluded that WTSP-TV was tied for first place with four of the other applicants under the criteria of local ownership and civic participation, and was tied for first place with two other applicants under the criterion of diversity of business interests. Under the important criterion of diversification of the media of mass communications, he concluded that WTSP-TV ranked fifth among the applicants. He found no basis for significant difference among the applicants as to proposed facilities except that he assessed a demerit against Gulfcoast and Tampa for failure to provide for any studios in St. Petersburg. WTSP-TV was accorded a preference under the criteria of integration of ownership and management and program planning. The Examiner found no significant difference in program policies among the applicants but concluded that WTSP-TV's program proposals were superior. Under the criterion of past broadcast experience, WTSP-TV was accorded a three-way tie for first place. Finally, among those applicants who had relied upon past broadcast performance, the Examiner found that WTSP-TV was entitled to first preference, with Tampa rating second.

b. The First Commission Decision

In its Decision on the first hearing record, the Commission's majority¹ adopted the Examiner's findings without significant changes but modified his conclusions in major respects.

Instead of a first for program planning and proposals, it gave WTSP-TV a five-way tie for the former and a six-way tie for the latter. It erased the demerit which the Examiner had assigned to Tampa and Gulfcoast for their studio proposals. Under the criterion of area familiarity, which includes local ownership, civic activity, and diversification of business interests, WTSP-TV was down-graded to fourth place. With respect to integration of ownership with management, the Commission found WTSP-TV to rank second rather than being tied for first place.

Lumping broadcast experience and past broadcast record together, the Commission devoted more of its conclusions to these criteria than any other and ultimately concluded that "of the applicants relying upon past broadcast record, WTSP-TV is entitled to a significant preference." It concurred in the Examiner's fifth-place rating of WTSP-TV under diversification of ownership of mass communications media. While the Commission's conclusions did not state with any clarity the weight accorded the various criteria discussed, it so watered down the other preferences the Examiner had given WTSP-TV as to make it apparent that, in agreeing with the Examiner's selection of WTSP-TV or the winning applicant, it accorded great weight to the "significant preference" for past broadcast record.

c. The Supplemental Initial Decision

The Examiner found that the remand hearing record clearly showed that there was a great difference between the programming of WLCY (then WTSP) which had been on the station, and had been relied upon at the original hearing, and the programming which was placed on the station shortly after the original hearing. The entire programming format had been

¹ Two Commissioners dissented and two abstained from voting.

changed and in particular the method of serving the needs of agricultural, religious and other public service groups. Most of the programs of fifteen minutes or greater duration which had formerly been presented on behalf of such groups had been discontinued.

The greater part of the Supplemental Initial Decision was devoted to the question whether the Rahall brothers and their associates had acted in good faith in producing certain programs on their St. Petersburg AM station, in relying upon that programming in support of their television proposal, and in then substituting substantially different programming shortly after the evidentiary portion of the original hearing on the television application had terminated. He concluded that these actions had been taken in good faith and accordingly that issue 3(a) should be resolved in favor of WTSP-TV.

With respect to issue 3(b), whether the Commission's January 19, 1962 Decision should be modified, he first asserted that a comparative reevaluation of the applicants would require an updating of the record, resulting in additional delay in the establishment of service on Channel 10. He then concluded that WTSP-TV was still entitled to the preference for past broadcast performance given it by the Examiner and the Commission in their earlier decisions, because the programming of WLCY and the reliance thereon had been in good faith, and because the station "under its changed format . . . has continued to provide extensive service to the public service organizations in its entire service area, and has presented an adequate amount of local live programming." For these reasons he recommended affirmance of the original Decision.

d. The Second Commission Decision

The Commission noted that "in January of 1960, less than one year after the last evidentiary hearing, WLCY began to terminate what finally totalled twelve previously relied upon programs, and that at the present time only three of the original twenty-four programs relied upon remain on the schedule." It agreed with the Examiner, however, that WTSP-TV's

reliance upon the pre-hearing performance of WLCY had been in good faith.

With respect to comparative reevaluation of the applicants, the Commission stated: "We believe . . . that in view of the seven years of protracted hearings and the three decisions all preferring WTSP-TV, we should not, absent extraordinary reasons, reevaluate this case from a *de novo* standpoint. We find no such compelling reasons here." Specifically with respect to the "significant preference" accorded WTSP-TV for past broadcast record, the Commission stated:

Pursuant to the remand issues, the Examiner made detailed findings in regard to WLCY's past broadcast record in 1957 and 1958. These findings reflect the record evidence which we relied upon in concluding in our prior decision that WLCY was most responsive to the needs of St. Petersburg. *For the purposes of clarification, we point out that we do not rely on WLCY's most recent performance record as evidence of likelihood of effectuation. Rather, we are affirming our prior decision based upon the facts elicited at the original hearing because, as shown in detail by paragraphs 6 to 28, supra, subsequent changes in WLCY's programming do not establish that the programming relied upon by WTSP-TV in the original hearing was merely a facade or constituted a misrepresentation. (R. 6222. Emphasis supplied.)*

**e. The Memorandum Opinion and Order Denying
Tampa's and Suncoast's Petitions for
Reconsideration**

This opinion was very brief and denied the petitions solely on the ground that they raised nothing new. No further basis for the Commission's decision to reaffirm the grant to WTSP-TV was advanced.

STATUTES

Pertinent provisions of the Communications Act are set forth in the Appendix to this Brief.

STATEMENT OF POINTS

1. On evaluating the record on remand the Commission considered only the questions whether the decision to place certain programming on WTSP (later WLCY) and the representations by WTSP-TV at the original hearing concerning past programming of the AM station were made in good faith, and failed to consider whether the change in WLCY programming, regardless of good or bad faith, required a withdrawal of the "significant preference" awarded for past programming.

2. The Commission could not properly continue WTSP-TV's preference for past programming without evaluating WLCY's new programming, which it specifically declined to do.

3. The Commission's original Decision rested so heavily upon the preference for past programming that if such preference had been withdrawn, as it properly should have been, the basis of that Decision would have been so eroded as to require a comparative reevaluation of the applicants.

4. The losing applicants' petitions for reconsideration were held in abeyance during the further hearing, and the Commission was required in acting upon such petitions to take into consideration the entire record as it then stood, including the record made at the further hearing.

SUMMARY OF ARGUMENT

The Commission's conclusion that the Rahalls had acted in good faith was insufficient, by itself, to warrant affirmance of WTSP-TV's "significant preference" for past performance. The Commission was required, if it did not withdraw the preference, to consider the merits of WLCY's new programming to determine whether the Rahalls' performance as a whole still gave assurance of effectuation of proposals.

The "significant preference" for past performance was basic to the ultimate selection of WTSP-TV and with it withdrawn, as it should

have been, it was incumbent upon the Commission to reevaluate the applicants comparatively.

The Commission's failure to consider the entire record then before it in passing on the petitions for reconsideration was a denial of due process. It was improper for the Commission to give weight to the fact that the Initial Decision, the Supplemental Initial Decision, and the first Commission Decision had favored WTSP-TV.

ARGUMENT

I

THE COMMISSION'S CONCLUSION THAT THE
"SIGNIFICANT PREFERENCE" ACCORDED WTSP-TV
FOR PAST BROADCAST PERFORMANCE SHOULD NOT
BE WITHDRAWN WAS ARBITRARY AND CAPRICIOUS

In their Decisions on the original record, the Examiner and the Commission both gave WTSP-TV a preference for past broadcast performance. This preference was based primarily on evidence describing in detail some twenty odd programs that were carried on the Rahalls' St. Petersburg AM station prior to the original television hearing. In advancing this evidence, WTSP-TV obviously considered that it demonstrated on the part of its controlling stockholders an ability and willingness to serve the public interest in the field of broadcasting. The Examiner and the Commission agreed. The hearing record on remand demonstrated that beginning shortly after the first evidentiary hearing was completed the Rahalls radically changed the method of operation of their St. Petersburg AM station and commenced the abandonment of the programs which had allegedly demonstrated their service in the public interest and upon the basis of which they had been accorded their "significant preference." By the time the remand hearing record was concluded all but three of the twenty-four programs relied upon had departed from WLCY.

Nonetheless, both the Commission and the Examiner reaffirmed the preference for past broadcast performance on the ground that the selection of programs to be broadcast on WLCY prior to the television hearing and the reliance placed upon such programs at the hearing had been in good faith and not solely for the purpose of acquiring a competitive advantage.¹

The preference which is usually accorded superior past broadcast performance is not given for the purpose of reward. Rather, the Commission's decisions make it clear that it gives weight to past broadcast performance because good performance in this area inspires a confidence that an applicant will carry out his program representations and will as adequately serve the public interest with its new facilities as it did in the past with other facilities. *Sarkes Tarzian, Inc.*, 27 FCC 635, 17 R.R. 905 (1959); *Fisher Broadcasting Co.*, 30 FCC 177, 19 R.R. 997 (1961). Similarly, poor broadcast performance gives no assurance of effectuation of proposals, but rather the opposite, and is therefore an occasion for a demerit. *Television Broadcasters, Inc.*, 27 FCC 727, 17 R.R. 1169 (1959); *Liberty Television, Inc.*, 29 FCC 538, 19 R.R. 289 (1960). It seems evident, therefore, that confidence in effectuation of proposals engendered by superior past broadcast performance would be erased, or at least gravely diminished, by more recent inferior broadcast performance.

Although WTSP-TV would undoubtedly have been disqualified or at least assessed a substantial demerit if the Commission had found that the past performance of WLCY had not been a good faith effort to serve the public, but rather merely an effort to obtain an advantage in the television hearing, the fact that the Commission found that the Rahalls had acted in good faith does not dispose of the question whether the preference for such

¹ The Examiner appears also to have based his conclusion on findings that the new programming of WLCY, although wholly different from the earlier programming, served the public interest to substantially the same degree. The Commission, however, declined to consider the merits of the new programming.

broadcast performance should have been continued, in the face of clear evidence that the Rahalls had abandoned the type of performance on which they earlier relied. The Commission could not properly affirm the earlier accorded preference without considering the merits of the new WLCY programming to determine whether it still gave the assurance of effectuation of programming proposals and operation in the public interest which the earlier programming appeared to do. The Commission, however, specifically declined to do this, stating: "We do not rely on WLCY's most recent performance record as evidence of likelihood of effectuation. Rather we are affirming our prior decision based upon the facts elicited at the original hearing"

The fact that the Commission might, had it undertaken to consider the merits of the new WLCY programming, have concluded that it was equally as meritorious as the old programming, is immaterial at this juncture. The Commission's Decision may not be affirmed on the basis of speculation as to the conclusions it might have reached had it undertaken proper consideration of the evidence of record.

II.

THE COMMISSION'S FAILURE TO UNDERTAKE A COMPARATIVE REEVALUATION OF THE APPLICANTS WAS ARBITRARY AND CAPRICIOUS

In reviewing the Examiner's first Initial Decision, the Commission eliminated or substantially down-graded many of the preferences which the Examiner had accorded WTSP-TV. After the Commission had modified the Examiner's conclusions, WTSP-TV had two ties for first place, a second place for integration of ownership with management, a fourth place for area familiarity, a fifth place for diversity of ownership of mass communications media, and a clear first only for past broadcast performance record and broadcast experience. The Commission denoted this preference as "significant," and it seems apparent that without this preference the ultimate selection of WTSP-TV would have been unlikely

or at least would have required an explanation beyond what can be found in the Commission's Decisions as they stand.

Without the preference for past broadcast record, the primary basis of the Commission's selection of WTSP-TV is swept away. As has been shown, it was arbitrary and capricious for the Commission to continue this preference merely because the Rahalls had acted in good faith and without considering the merits of the later WLCY programming. With the basis of WTSP-TV's only "significant preference" eroded, the basis of the Commission's ultimate selection was likewise eroded. The failure to undertake a new comparative evaluation of the applicants denied the losing applicants the due process that is required by the Supreme Court's ruling in *Ashbacker Radio Corp. v. Federal Communications Commission*, 326 U.S. 327 (1946), and this Court's ruling in *Johnston Broadcasting Co. v. Federal Communications Commission*, 85 U.S. App. D.C. 40, 175 F.2d 351 (1949).

III.

THE COMMISSION'S FAILURE TO DISPOSE OF THE LOSING APPLICANTS' PETITIONS FOR RECONSIDERATION ON THE BASIS OF THE ENTIRE RECORD THEN BEFORE IT DENIED PETITIONERS DUE PROCESS AND RIGHTS UNDER SECTION 405 OF THE COMMUNICATIONS ACT

Petitions for reconsideration of the Commission's January 19, 1962 Decision were filed by several of the applicants, including appellant herein. The Commission withheld action on these petitions during the further hearing on remand. Thus at the time the Commission acted it had before it a new record having an important bearing on the comparative qualifications of WTSP-TV. The Commission failed, however, to give consideration to that new record except to the extent that it bore upon the absolute qualifications of WTSP-TV. In so doing, the Commission acted contrary to the requirements of Section 405 of the Communications Act. *The Enterprise Company v. Federal Communications Commission*, 97 U.S. App. D.C.

374, 231 F.2d 708 (1955). See also *Fleming v. Federal Communications Commission*, 96 U.S. App. D.C. 223, 225 F.2d 523 (1955). Cf. *Zenith Radio Corp.*, 8 R.R. 895 (1953).

Assigning as a reason for failing to reevaluate the comparative qualifications of the applicants upon the basis of the entire record before it the fact that there had been three decisions all preferring WTSP-TV (the Initial and Supplemental Initial Decisions of the Examiner and the first Commission Decision) also constituted a denial of due process to the losing applicants and of their rights under Section 405 of the Communications Act. Cf. *Fort Harrison Telecasting Corp. v. Federal Communications Commission*, 111 U.S. App. D.C. 368, 297 F.2d 779 (1961).

CONCLUSION

For the foregoing reasons, the Decisions and Orders of the Federal Communications Commission denying the application of Tampa and granting the application of WTSP-TV should be reversed.

WHEREFORE, appellant respectfully requests that an order be entered by this Court reversing the Decisions and Orders complained of and granting appellant such other relief as may be just and proper in the premises.

Respectfully submitted,

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April 16, 1965

APPENDIX

STATUTES INVOLVED

The relevant provisions of the Communications Act of 1934, as amended (47 U.S.C. §151 *et seq.*), are as follows:

Section 402. (b) Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit or station license, whose application is denied by the Commission.

* * *

(6) By any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1), (2), (3), and (4) hereof.

* * *

Section 405. After an order, decision, report, or action has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission pursuant to a delegation under section 5(d)(1), any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for rehearing only to the authority making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 5(d)(1), in its discretion, to grant such a rehearing if sufficient reason therefor be made to appear. A petition for rehearing must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of. No such application shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner

to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for rehearing shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass. The Commission, or designated authority within the Commission, shall enter an order, with a concise statement of the reasons therefor, denying a petition for rehearing or granting such petition, in whole or in part, and ordering such further proceedings as may be appropriate. *Provided*, That in any case where such petition relates to an instrument of authorization granted without a hearing, the Commission, or designated authority within the Commission, shall take such action within ninety days of the filing of such petition. Rehearings shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding shall be taken on any rehearing. The time within which a petition for review must be filed in a proceeding to which section 402(a) applies, or within which an appeal must be taken under section 402(b) in any case, shall be computed from the date upon which public notice is given of orders disposing of all petitions for rehearing filed with the Commission in such proceeding or case, but any order, decision, report, or action made or taken after such rehearing reversing, changing, or modifying the original order shall be subject to the same provisions with respect to rehearing as an original order.

BRIEF FOR APPELLEE

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
for the District of Columbia Circuit

No. 19,048

FLORIDA GULFCOAST BROADCASTERS, INC.,
Appellant,
v.
FEDERAL COMMUNICATIONS COMMISSION,
Appellee,
WTSP-TV, INC.,
Intervenor.

FILED JUN 11 1965

Nathan J. Paulson
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No. 19,172

SUNCOAST CITIES BROADCASTING CORP.,
Appellant,
v.
FEDERAL COMMUNICATIONS COMMISSION,
Appellee,
WTSP-TV, INC.,
Intervenor.

No. 19,175

TAMPA TELECASTERS, INC.,
Appellant,
v.
FEDERAL COMMUNICATIONS COMMISSION,
Appellee,
WTSP-TV, INC.,
Intervenor.

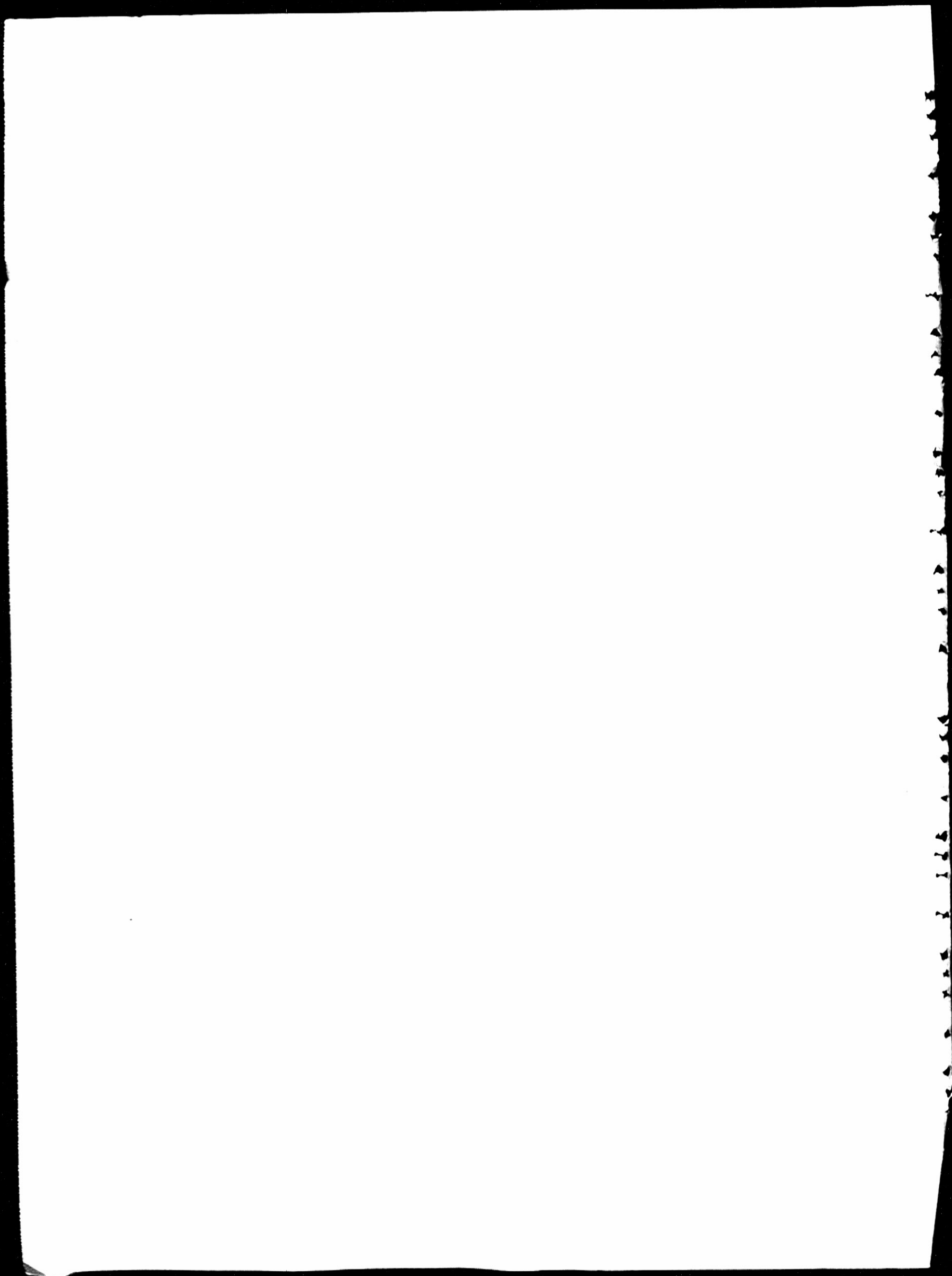
ON APPEAL FROM DECISIONS AND ORDER OF
FEDERAL COMMUNICATIONS COMMISSION

HENRY GELLER,
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Associate General Counsel,

ROBERT B. JACOBI,
Counsel.

Federal Communications Commission
Washington, D. C. 20554



STATEMENT OF QUESTIONS PRESENTED

I. The questions presented, as agreed to by the parties in a stipulation approved by this Court on March 16, 1965, are:

1. Whether in the remand hearing in this proceeding the Commission committed error in the following respects:

- (a) In failing to conclude that the evidence in the remand hearing required the withdrawal of the "significant preference" for past broadcast record awarded to the winning applicant (WTSP-TV) in the original hearing; and
- (b) In refusing to reevaluate all applicants for a new television station license for Channel 10 at Largo, Florida, on a comparative basis in light of the entire record in this proceeding.

2. With respect only to the appeal in Case No. 19,048 whether the Commission committed error in the remand hearing in the proceeding by reason of its failure to conclude that the winning applicant (WTSP-TV) in the original hearing was absolutely disqualified on character grounds from receiving the television facility for Channel 10 at Largo, Florida.

3. With respect only to the appeals in Cases No. 19,048 and 19,172, whether contrary to the requirements for a fair hearing, the Commission made basic findings of fact and conclusions contrary to and unsupported by substantial evidence of record, failed to make

other findings and conclusions compelled by substantial evidence of record and reached ultimate findings and conclusions not rationally derived from or supported by the basic findings or substantial evidence of record.^{*/}

II. Florida Gulfcoast Broadcasters, Inc., appellant in Case No. 19,048, and Suncoast Broadcasting Corp., appellant in Case No. 19,172, both assert as an issue that the Commission committed error in the remand hearing by refusing to update the record regarding all the applicants in this proceeding. The appellee and the intervenor do not agree that this issue is raised by the appellants' notices of appeal.

III. Florida Gulfcoast Broadcasters, Inc. asserts as an additional issue the questions as to whether the "Commission's comparative criteria presumptions are arbitrary, capricious and unreasonable." The appellee and the intervenor do not agree that this issue is raised by these appeals.

^{*/} The appellee and the intervenor reserve the right to argue that Issue No. 3 is so generally stated and is so lacking in specificity as to fail to meet the requirements for a meaningful issue on appeal.

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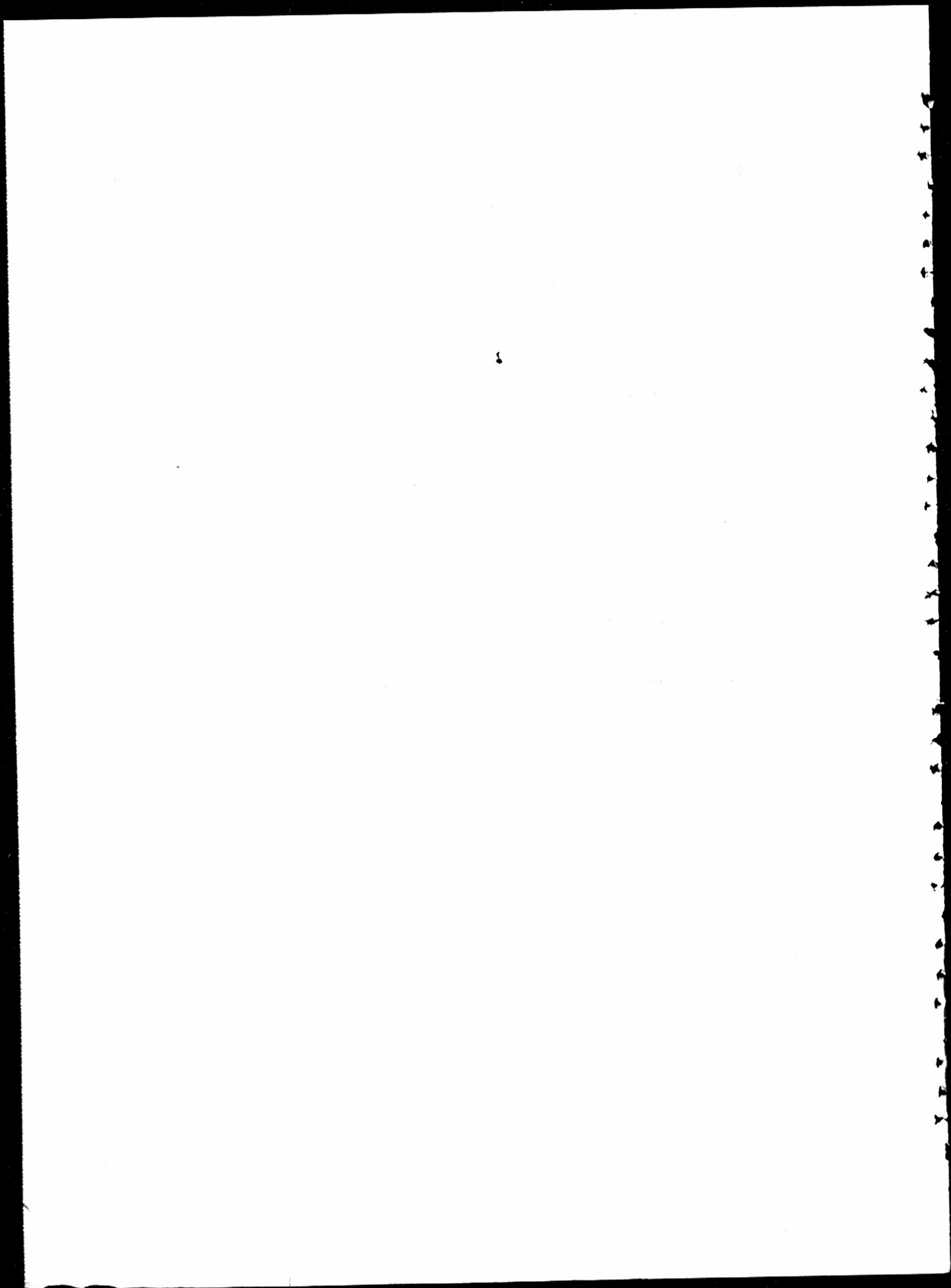
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marked with an asterisk.



IN THE UNITED STATES COURT OF APPEALS
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No. 19,048

FLORIDA GULFCOAST BROADCASTERS, INC.,
Appellant,
v.
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Appellee,
WTSP-TV, INC.,
Intervenor.

No. 19,172

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Appellee,
WTSP-TV, INC.,
Intervenor.

No. 19,175

TAMPA TELECASTERS, INC.,
Appellant,
v.
FEDERAL COMMUNICATIONS COMMISSION,
Appellee,
WTSP-TV, INC.,
Intervenor.

ON APPEAL FROM DECISIONS AND ORDER OF
FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

These consolidated appeals are filed pursuant to Section 402(b) of the Communications Act of 1934, as amended, 47 U.S.C. 402(b) from (1) a Decision of the Federal Communications Commission released January 19, 1962 (R. 4810-4838) granting the application of WTSP-TV, Inc. for a new television station to operate on Channel 10 at Largo, Florida; (2) a Decision of the Federal Communications Commission released November 6, 1964 (R. 6208-6232) after remand affirming the grant to WTSP-TV; and (3) an Order of the Commission released January 13, 1965 (R. 6261-6262) denying Petitions for Reconsideration.^{1/} The matters appealed from pertain to the grant of the application of WTSP-TV, Inc., and the denial of the mutually exclusive applications of Florida Gulfcoast Broadcasters, Incorporated, City of St. Petersburg, Florida, Suncoast Cities Broadcasting Corporation, Tampa Telecasters, Inc. and Bay Area Telecasting Corporation. Neither City of St. Petersburg, Florida nor Bay Area Telecasting Corporation have taken appeals. It is believed that a more complete and less argumentative statement of the case than those appearing in appellants' briefs will be helpful to the Court.

Channel 10 was allocated to Largo, Florida on June 3, 1957. Between July 24, 1957 and December 17, 1957, the mutually exclusive applications of Florida Gulfcoast Broadcasters, Incorporated (Gulfcoast), City of St. Petersburg, Florida (City),

^{1/} Florida Gulfcoast Broadcasters did not appeal from the final Order.

Suncoast Cities Broadcasting Corporation (Suncoast), Tampa Telecasters, Inc. (Tampa), WTSP-TV, Inc. (WTSP) and Bay Area Telecasting Corporation (Bay Area) were filed with the Commission. Thereafter, by Order dated May 23, 1958 (R. 288-290), the aforesaid six applications were designated for hearing in a consolidated proceeding. As a result of agreements reached between the parties at a pre-hearing conference, October 1, 1958 was established as the "cut-off" date for purposes of comparative evaluation. The Hearing began on January 5, 1959, was formally closed on November 19, 1959, but, as a result of petitions filed by various parties, the record was reopened on several occasions and finally closed on December 6, 1960.

Examiner's Initial Decision:

The Examiner's Initial Decision dated January 31, 1961 (R. 4556-4689) proposed the grant of the application of WTSP. Florida Gulfcoast Broadcasters, Inc., 32 FCC 219, 23 Pike & Fischer, R.R. 28 (1961) (R. 4556-4689). In evaluating the applicants under the well-established comparative criteria, employed by the Commission in cases of this kind, the Examiner awarded preferences to WTSP in the categories of Integration of Ownership and Management, Past Broadcast Record, Program Planning and Program Proposals, placing particular reliance on the latter two. In the categories of Local Residence, Civic Participation, Diversity of Business Interests, Proposed Facilities, Program Policy and Broadcast Experience, WTSP shared an equal preference with other applicants. The Examiner concluded that based upon these aforesaid factors WTSP had demonstrated

a superiority over all other applicants that would assure the effectuation of its proposal.

First Commission Decision:

All parties filed exceptions to the Initial Decision and participated in Oral argument before the Commission. On January 19, 1962, the Commission released its Decision granting the application of WTSP. Florida Gulfcoast Broadcasters, Inc., 32 FCC 197, 23 Pike & Fischer, R.R. 1 (1962) (R. 4810-4838).^{2/} Although the Initial Decision was modified in various respects the Commission agreed with the Examiner's ultimate result and concluded that WTSP was entitled to a significant preference for its past broadcast record and to a preference for its broadcast experience. In the categories of (1) Proposed Programming, Planning, and Policy, (2) Equipment, Studios and Staff, WTSP was awarded an equal preference with other applicants. Four of the unsuccessful parties, Tampa, Suncoast, Bay Area and City were found determinatively deficient in various comparative categories to WTSP and Gulfcoast. As between the latter two parties, WTSP received a significant preference over Gulfcoast in the category of past broadcast record on the basis that the Gulfcoast record reflected a "steadily declining operation rendering decreasing service to the public" (R. 4819) culminating in a programming imbalance, whereas the WTSP past broadcast record revealed a substantially greater sensitivity to the overall needs and interests of the community.

^{2/} The vote was three to two, with two Commissioners not participating (R. 4810).

The Commission found four of the applicants (Tampa, Suncoast, Bay Area and City) decidedly inferior to Gulfcoast and WTSP. Tampa was found comparatively wanting in the planning of its proposal, area familiarity, integration of ownership with management and past broadcast record, ranking no higher than third (with the exception of Tampa's three-way tie for second as to past broadcast record) in the areas pertaining to the likelihood of effectuation. Suncoast suffered comparatively from lack of integration of ownership with management and broadcast experience, factors not overcome by its shared preference in area familiarity. Bay Area was found comparatively deficient in area familiarity and broadcast experience. City's comparative shortcomings were found in the areas of broadcast experience, integration of ownership with management and past broadcast record (R. 4821-4822).

With respect to those differences existing between Gulfcoast and WTSP, the Commission stated that (R. 4822):

"The factors of integration, area familiarity, and broadcast experience, as to which the differences . . . are not substantial, become less significant where each has a past broadcast record in the area sought to be served."

In considering the past broadcast record of Gulfcoast's St. Petersburg station (during its last three years of ownership, 1953-1955),^{3/}

3/ Gulfcoast sold its St. Petersburg stations to WTSP in 1956.

the Commission pointed to a "...steadily declining operation rendering decreasing service to the public." (R. 4819.) The Commission observed that on the basis of the 1953 composite week, "...the overall programming was not seriously out of balance" (R. 4819); that the 1954 composite week showed an increase in entertainment programming and a decrease in agricultural programming; and that the 1955 composite week reflected a further increase in entertainment programming, a decrease in discussion programming and "...no time ... devoted to agricultural or educational matter" (R. 4819) ^{4/} WLCY's past broadcast record showed that a well rounded program service was being provided with more time being devoted to religious, agricultural, educational, news and discussion programs than was allotted by the previous owners of the station and "...no categories . . . completely ignored as was the case with both WSUN and Poynter's WTSP" (R. 4820). ^{5/} The Commission found "particularly noteworthy" the fact that the station devoted 22.7% of its broadcast time to local live programming (R. 4820). Upon this basis the Commission concluded that WTSP was entitled to a significant preference (R. 4820-4821).

Finally, the Commission concluded that the significant preference awarded to WTSP for past broadcast record together with its preference for broadcast experience outweigh the advantages enjoyed by Gulfcoast, and "...convince us that WTSP-TV will more likely effectuate its proposal" (R. 4822).

^{4/} Tampa and City's past broadcast record also were found to lack balance (R. 4819-4820).

^{5/} WTSP is the licensee of Station WLCY, St. Petersburg, having purchased the station in 1956 from the principals of Gulfcoast.

Petition for Reconsideration:

Following the Commission's decision, four of the five unsuccessful applicants filed Petitions for Reconsideration.^{6/} The petitions of Gulfcoast and City additionally requested reopening of the record for the adduction of further evidence concerning the then current programming of WLCY. The petitions for reopening the record were premised upon the fact that the Commission had placed substantial reliance upon WLCY's^{7/} past broadcast record and that following the close of the record, WLCY's programming changed radically. Insofar as the petitions sought reopening of the record, the Commission denied relief on the basis that such evidence urged in support thereof was not newly discovered and that petitioners were aware of such evidence as the underlying facts had developed. Florida Gulfcoast Broadcasters, Inc., 23 Pike & Fischer, R.R. 901 (1962) (R. 5044-5048). Notwithstanding the foregoing, however, the Commission (1) reopened the record on its own motion stating that:

"...the matters presented in the foregoing petitions raise sufficient doubt as to the validity of some conclusions upon which our award to WTSP-TV rested. . .," (R. 5046);

(2) stayed its prior grant to WTSP; (3) held in abeyance action on the Petitions for Reconsideration pending resolution of the remand proceeding; and (4) remanded the proceeding for further hearing upon the following issues:

6/ Bay Area did not file a Petition for Reconsideration.
7/ As stated supra, WLCY is licensed to WTSP-TV, Inc.

- "1. To determine the nature of the programming service rendered by Station WLCY since the close of the record herein on May 16, 1960, and the extent to which such service differs from that relied upon by WTSP-TV at the earlier hearing herein.
- "2. To determine the reasons underlying (a) the choice of programming service of Station WLCY relied upon WTSP-TV at the earlier hearing herein; and (b) the choice of programming service of that station since May 16, 1960.
- "3. To determine, in light of the facts developed under the foregoing issues, (a) whether WTSP-TV, Inc., possesses the requisite character qualifications to be a licensee of the Commission, and (b) whether, and in what respects, modification of the Commission's Decision in this proceeding is required."

In defining the objective of the remand proceeding, the Commission stated (R. 5047):

"Of primary significance here, . . . is whether, as charged by City and Gulfcoast, the prechange programming was a sham designed primarily to obtain a preference in this proceeding. If such is the case, questions of character qualifications, apart from the normal comparative criteria may be raised. Of course, the reasons for the change in format would be relevant to this issue."

Further clarification of the scope of the issues was provided by the Commission's Review Board in response to WTSP's Motion to Clarify or Enlarge (Florida Gulfcoast Broadcasters, Inc., 24 Pike & Fischer, R.R. 800 (1962) R. 5108-5113, 5112):

- "7. The Commission reopened the record and remanded the proceeding for further hearing on the basis of the allegation made by Gulfcoast and City against WTSP-TV. Because of the ad hoc nature of the remand, we are of the view that it would be premature to enlarge the issues at this time

to require an updating of the record as to all of the applicants and/or a comparative re-evaluation of the applicants. The limited issues framed by the Commission do not provide for such updating and/or comparative evaluation. On the contrary, they limit the inquiry to the programming changes effected by WLCY (issue 1) and the reasons therefor (issue 2), a determination as to whether, in light of the evidence adduced pursuant to the first two issues, WTSP-TV has the requisite qualifications to be a licensee (issue 3(a)), and a recommendation as to whether and in what respects modification of the Commission's decision is required (issue 3(b)). All other determinations relating to substance and procedure are held in abeyance; thus, the Commission has reserved the determination of the nature and extent of any actions or proceedings which may follow the conclusion of the ad hoc remand hearing."

The Supplemental Initial Decision:

On August 30, 1963, the Hearing Examiner issued a supplemental initial decision which affirmed the earlier decision of the Commission granting the application of WTSP. Florida Gulfcoast Broadcasters, Inc., 37 FCC 856, 4 Pike & Fischer, R.R. 2d 27 (1963) (R. 6016-6081). The Examiner set forth the scope of the issues (as he interpreted the Review Board's Memorandum Opinion and Order) as requiring (R. 6018):

"...only a determination as to whether the changes that were shown to have occurred in the programming of Radio Station WLCY (formerly WTSP) subsequent to the original hearing were of such a nature as to require a conclusion adverse to the character qualifications of WTSP-TV, Inc., and did not contemplate a general up-dating of the record for comparative purposes."

Extensive and detailed findings were made regarding the nature of WTSP's programming (by category) relied upon at the first hearing, the programming broadcast since the close of the first

hearing record, and the underlying reasons for the choice of such programming. These findings revealed that WLCY since the close of the hearing record has continued to provide programming in all program categories; entertainment, religion, agricultural, educational, news, discussion and talks.^{8/} (R. 6022-6035.) Program analysis by type showed the following (R. 6021):

Type	1957 Comp. Wk.	1958 Comp. Wk.	1961 Comp. Wk.	1962 Comp. Wk.
Ent.	65.9	60.1	79.8	75.0
Rel.	7.3	7.6	2.6	3.3
Agri.	0.3	0.6	1.5	1.8
Educ.	0.2	1.0	0.4	1.5
News	10.0	10.0	9.2	9.7
Disc.	4.4	5.3	4.7	6.5
Talk	11.9	15.6	1.8	2.2

Local live programming, as reflected by the 1961 and 1962 composite weeks, constituted 16.2% and 19.5% respectively of WLCY's total composite weeks (R. 6022).

As to the choice of programming relied on at the original hearing, the Examiner concluded that "...the decisions as to the programs to be presented over the radio station [were made] on the basis that such programs satisfied needs of the area that were not, at that time, being adequately presented over any other station, and that ...decision[s] a[s] to the majority of the programming had been made, or planned, prior to either the allocation of Channel 10

^{8/} The aforesaid categories are utilized by the Commission as part and parcel of several forms including the so-called composite weeks forms.

to St. Petersburg, or the employment of Mr. Harry Wagner." (R. 6075).^{9/}

Concerning the programming rendered since the close of the hearing record, the Examiner concluded that such choice was ". . . based upon the licensee's dissatisfaction with the audience response to the programming as it had formerly been broadcast, and its determination to increase its service area audience, and its service to public service organizations throughout its entire regional area" (R. 6077).

Ultimately the Examiner concluded that no basis exists for a finding or conclusion that the WLCY program service relied upon at the first hearing ". . . was 'prefabricated' for improper purposes, or constituted a 'sham' designed to influence the Commission", and that WTSP possesses the requisite character qualifications to be a licensee of the Commission (R. 6079).

While stating that a comparative reevaluation of the applicants would be impossible without updating the record and alluding to the time considerations involved therein, both retrospective and prospective, the Examiner ultimately concluded that in view of the favorable conclusion regarding WTSP's character qualifications together with the fact that WTSP did broadcast the programs relied on at the first hearing and has not tried to conceal anything from the Commission or the parties, the decision of the Commission granting the

^{9/} Mr. Wagner was hired by WTSP in October 1957 to be the proposed program director of the television station. In connection therewith he assisted in the preparation of WTSP's application. Appellant contended that Wagner had participated in the selection of programming broadcast by WLCY and relied on at the original hearing.

application of WTSP should be affirmed without modification (R. 6079-6081).

The Commission's Decision:

Exceptions to the Supplemental Initial Decision were filed by all parties and oral argument was heard before the Commission. On November 6, 1964, the Commission released its Decision vacating the stay previously imposed upon WTSP, affirming the previous grant to WTSP, and denying the pending petitions for reconsideration to the January, 1962 decision. Florida Gulfcoast Broadcasters, Inc., 37 FCC 833, 4 Pike & Fischer, R.R. 2d 1 (1964) (R. 6208-6236).^{10/}

The decision first considered the supplemental initial decision and thereafter treated the pending petitions for reconsideration to the 1962 decision. With respect to the scope of the remand proceeding, the Commission referred to the Memorandum Opinion and Order of the Review Board, to the effect that (R. 6210):^{11/}

"...because of the ad hoc nature of the remand, the issues should be interpreted narrowly, required only a determination as to character qualifications of WTSP-TV, Inc., and did not contemplate a general updating of the record for comparative purposes."

It specifically adopted the findings and conclusions of the Examiner's supplemental initial decision except as expressly modified in the Decision and in the rulings on exceptions (R. 6210).

Pertinent to the scope of the ad hoc remand proceeding, the Commission found that contrary to the allegations of WTSP's

^{10/} The vote was four to one, with two Commissioners not participating.
^{11/} Florida Gulfcoast Broadcasters, Inc., 24 Pike & Fischer, R.R. 800 (1962).

adversaries there had been no "sharp increase" of public service programs by WLCY after the Commission's allocation announcement in June, 1957 (R. 6213-6214); that the 1960 format change resulted from the licensee's determination to broaden the station's audience within its service area (R. 6216); that the format change necessitated the termination of a number of public service programs but that the licensee never abandoned its community obligations or all of its public service programming (R. 6217-6218); and that the format change was characterized as a "monitor" format wherein news, sports, weather and other informational and public service features were interspersed throughout the entertainment format (R. 6216, 6217). Ultimately, the Commission concluded that in view of the evidence of record WTSP ". . . must be exonerated from the charge of misrepresentation" (R. 6218).

The pending petitions for reconsideration to the 1962 decision were denied on the basis that they failed to demonstrate either material errors or omissions and that the bulk of contentions raised therein were repetitive or cumulative or arguments considered in the original decision (R. 6219).

Having found that WTSP possessed the character qualifications to be a licensee and having disposed of the pending petitions for reconsideration, the Commission noted that in view of the time considerations thus far entailed and the fact that on three separate occasions WTSP has prevailed, it should not (R. 6222):

"...absent extraordinary reasons, reevaluate this case from a de novo standpoint."

and that no such compelling reason existed here. In affirming the grant to WTSP, the Commission emphasized that it was acting upon (R. 6222):

"...the facts elicited at the original hearing because ...subsequent changes in WLCY's programming do not establish that the programming relied upon by WTSP-TV in the original hearing was merely a facade or constituted a misrepresentation."

Two of the unsuccessful applicants, City and Bay Area sought no further review. Gulfcoast lodged its appeal with this Court. Suncoast and Tampa filed petitions for reconsideration. In denying reconsideration, Florida Gulfcoast Broadcasting, Inc., FCC 65-28 (1965) (R. 6261-6262), the Commission again delineated the scope of the remand proceeding stating (R. 6262):

"Specifically, the remand proceeding called for a determination as to whether the program service of standard broadcast station WLCY, St. Petersburg, Florida, relied upon by WTSP-TV at the original hearing, was prefabricated for improper purposes or constituted a sham designed to influence the Commission.

* * *

"The remand proceeding which resulted in the Examiner's Supplemental Initial Decision was ad hoc in nature and did not contemplate a comparative reevaluation. Thus, we reserved for later determination the nature and extent of any action or proceedings which would follow the conclusion of the remand proceeding."

The petitions were expressly denied on the basis that the matters raised therein were fully considered and disposed of in the Decision -- specifically, no compelling reason for a de novo hearing was present (R. 6262).

SUMMARY OF ARGUMENT

I.

Petitions for Rehearing are addressed to the discretion of the Commission. Kentucky Broadcasting Corp. v. Federal Communications Commission, 84 U.S. App. D.C. 383, 174 F.2d 38 (1949); Kidd v. Federal Communications Commission, 112 U.S. App. D.C. 288, 302 F.2d 873 (1962). The Commission's authority in defining the scope of rehearing is established in Sections 4(j) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. 154(j) and 47 U.S.C. 405. Pursuant to this authority, the Commission ordered a further hearing, but properly restricted the scope of the remand to resolving a question as to the character of the proposed grantee (who had been chosen after a full comparative hearing). The issue arose on the basis of allegations by two losing applicants that changes in the programming of a radio station owned by the grantee had occurred under circumstances demonstrating bad faith.

Within the scope of the remand hearing, the Commission found that the programming relied upon at the original hearing and altered after the close of the first hearing record had not been "'prefabricated' for improper purposes, or. . .a 'sham' designed to influence the Commission in this proceeding" and that WTSP possessed the character qualifications to be a licensee. Thus, the consideration which initially prompted the remand was resolved in WTSP's favor.

The Commission properly concluded that no change in its decision was required, since the character issue was resolved in favor of the original grantee, and the evidence did not vitiate the basis for the programming preference awarded it in the earlier hearing. The basis

for the preference to WTSP turned on the fact that only WTSP, of all the applicants relying upon past broadcast record, presented balanced programming. The evidence in the remand showed that WTSP has continued to provide balanced programming under its new format, providing programming in all categories, public service features within the new format and that WTSP has never abandoned its community obligations or all of its public service programming. Under these circumstances, the decision that modification was not required represented a proper exercise of discretion.

The appellants' reliance on Enterprise Co. v. Federal Communications Commission, 97 U.S. App. D.C. 374, 231 F.2d 708 (1955), cert. den. 351 U.S. 920 (1956), and Butterfield Theatres, Inc. v. Federal Communications Commission, 99 U.S. App. 71, 237 F.2d 552 (1956), where remand was ordered for the purpose of considering the changed condition, is misplaced since, in this proceeding, a remand has been held and the "changed condition" has been fully evaluated.

Considering the protracted history of this proceeding, and the untimely manner in which the evidence on which appellants relied had been brought forward, together with the fact that a remand hearing had been conducted and WTSP exonerated, the Commission was amply justified in not conducting a de novo comparison of all the applicants. Kidd v. Federal Communications Commission, supra; Butterfield Theatres, Inc. v. Federal Communications Commission, supra; Interstate Commerce Commission v. City of Jersey City, 322 U.S. 503 (1943).

II.

Gulfcoast's attack on the comparative criteria, under which scores of licenses have been granted and upheld by this Court, was not presented below and is therefore not properly before this Court. Unemployment Compensation Commission of Alaska v. Aragon, 329 U.S. 143 (1946); Albertson v. Federal Communications Commission, 100 U.S. App. D.C. 103, 243 F.2d 209 (1957). In any event, the conclusions drawn are not meaningful absent the underlying reasons for the differences between promise and performance. Moreover, the validity of the test of "promise v. performance" in evaluating the entire criteria is in doubt since "promise v. performance" is but one of many factors bearing on the public interest.

III.

The Commission decision reflects careful consideration of the allegations pertaining to ex parte contacts and logging violations. The evidence of record showed both matters to be of no decisional significance. The so-called ex parte presentation was found to be nothing more than over-zealous publicity, with the circumstances clearly showing no improper motivation and no prejudice to any party to the proceeding. Some of the alleged logging violations were found not to have occurred and others were deemed to be inconsequential in nature, casting no doubt on the licensee's qualifications. The Commission's disposition of these matters was entirely reasonable and no basis has been shown for disturbing it.

ARGUMENT

I. THE COMMISSION'S ORDERS GOVERNING THE COURSE OF THE REMAND HEARING CONSTITUTED NEITHER AN ABUSE OF DISCRETION NOR A VIOLATION OF THE HEARING RIGHTS OF THE APPELLANTS.

It is well settled that petitions for rehearing are addressed to the discretion of the agency. Kentucky Broadcasting Corp. v. Federal Communications Commission, 84 U.S. App. D.C. 383, 174 F.2d 38 (1949), Kidd v. Federal Communications Commission, 112 U.S. App. D.C. 288, 302 F.2d 873 (1962). The Commission's authority in defining the scope of a rehearing is found in Section 4(j) of the Communications Act of 1934, as amended, 47 U.S.C. 154(j) which provides that:

"The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice";

and more specifically in Section 405 of the Act which states:

"Rehearings shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding shall be taken on any rehearing."

The Supreme Court has interpreted the former provision as

"'explicitly and by implication' delegating to the Commission power to resolve 'subordinate questions of procedure . . . [such as] the proper scope of the inquiry . . .'" Federal Communications Commission v. Pottsville Broadcasting Co., 309 U.S. 134, 138." Federal Communications Commission v. Schreiber, ___ U.S. ___, Case No. 482, decided May 24, 1965. See also American Communications Association v. United States, 298 F.2d 648 C.A. 2, 1962.

Following the release of the Commission's decision in January 1962, appellants, pursuant to Section 405, filed petitions for reconsideration to the Commission's decision.^{12/} Two of the petitions, by Gulfcoast and the City, sought reopening of the record and rehearing on the ground that substantial changes in the programming of Radio Station WLCY, owned by the successful applicant in the comparative proceeding, had been effected since the closing of the record and that the circumstances surrounding the changes reflected on its qualifications as a licensee. The Commission found that the information on which the petitioners relied had been in their possession since mid-1960, ten months before the initial decision had been released and a year and one-half before the case was decided by the Commission. For this reason the request to reopen the record was denied. The Commission felt, however, that the charges were sufficiently serious to warrant further inquiry, and, on its own motion, the grant was stayed and further hearings were ordered to ascertain essentially whether WLCY's past programming had been compiled primarily to influence a favorable decision on its television application and was thereafter curtailed, or whether both the old and the new program formats were motivated by good faith managerial judgments. (R. 5046).

Commencing with the Opinion and Order which remanded and reopened the record and continuing through the Commission's final disposition of this proceeding in its Memorandum Opinion and Order denying petitions for reconsideration to its 1964 decision, it was made clear that the remand did not contemplate a broad reopening of

^{12/} City also filed a petition for reconsideration.

the proceeding for a de novo comparison of the applicants, but that on the contrary it was for the single purpose of assessing WTSP's character qualifications in the light of the evidence regarding the motivation for the programming of its radio station, both before and after the change in format. Any initial doubts on this score were resolved when in response to a petition for clarification of the issues, the Commission's Review Board stated (R. 5108-5113):

"Because of the ad hoc nature of the remand, we are of the view that it would be premature to enlarge the issues at this time to require an updating of the record as to all of the applicants and/or a comparative re-evaluation of the applicants. The limited issues framed by the Commission do not provide for such updating and/or comparative evaluation. On the contrary, they limit the inquiry to . . . a determination as to whether, in light of the evidence adduced pursuant to the first two issues. WTSP-TV has the requisite qualifications to be a licensee . . . and a recommendation as to whether and what respects modification of the Commission's decision is required . . ." 13/

This holding was later affirmed by the Commission, when, in disposing of the petitions for reconsideration to the 1964 decision, it stated (R. 6261):

"The remand proceeding which resulted in the Examiner's Supplemental Initial Decision was ad hoc in nature and did not contemplate a comparative reevaluation. Thus we reserved for later determination the nature and extent of any action or proceedings which would follow the conclusion of the remand proceeding."

On the basis of the evidence adduced, however, the Commission found that no further proceedings and no reevaluation of the applicants were necessary. This was because, after considering 13/ Appellants did not seek review of the Board's Order.

the evidence and the examiner's supplemental decision together with the exceptions and oral argument directed thereto by the parties, the Commission concluded that the validity of its earlier determination had not been undermined. In the succeeding sections of this argument we will show that this determination was wholly reasonable, that no factual or legal considerations compelled the comparison de novo that appellants now seek, and that the refusal of the Commission to expand the scope of its inquiry was plainly a permissible exercise of discretion.

A. The Commission Properly Held That The Circumstances Surrounding The Change In Programming Did Not Reflect On The Qualifications Of WTSP, Inc.

Resolution of the character issue required findings as to the nature of the programming service rendered by WLCY since the close of the original hearing record, the extent to which such service differed from that relied on at the original hearing, and the underlying reasons for the choice of the aforesaid programming services. The Supplemental Initial Decision made detailed findings of fact regarding programming and program analysis relied on at the original hearing and rendered by WTSP since the close of the original hearing record. By and large these findings were adopted by the Commission and are not in dispute at this time. More important to the resolution of the ultimate character issue were the reasons underlying WTSP's choice of programming.

Turning initially to the programming relied on at the original hearing, the Commission found that there had been no "sharp increase"

or "sudden proliferation" in WLCY's public service programming, thereby refuting the allegation that the programming was a "sham" designed to obtain a comparative reference. (R. 6213-14) Specifically the Commission pointed to the fact that the majority of programs relied on at the original hearing (thirteen of twenty-four) had their genesis prior to the date that Channel 10 was even allocated to Largo and thus could not reasonably have been formulated with the television application in mind; and three other programs (of the remaining eleven) were entertainment programs, not public service. The Commission found that eight programs relied on at the original hearing were added after the Channel 10 allocation date, but concluded that no adverse inference should be drawn in view of the fact that WLCY's manager was new to the area and that of necessity, time was consumed by him in reviewing the programming of the station and its competitors, and in ascertaining the needs and desires of the community at large. Further evidence rebutting the "sudden proliferation" theory was found in that WLCY had broadcast three other public service programs prior to the date of allocation not relied on at the original hearing and that the station had revamped its news department prior to the allocation date. (R. 6213).

The Commission also was satisfied that the termination of the programming relied on at the original hearing, following the closing of the record, did not establish that the said programming relied on was a sham designed primarily to gain a comparative preference. Six of said programs were designated as series and had run

their course prior to the end of the original hearing - a fact apparent upon the original record. Eight of the terminated programs had their genesis prior to the date that the alleged motive to deceive the Commission came into existence (the allocation date). Three of the programs originally relied upon were still being broadcast and, of the remaining seven terminated, three were in the entertainment category. In considering the underlying reasons for termination, the Commission found that such action was undertaken after WLCY's general manager had made a study of the trend of independent radio programming, a study of WLCY's overall performance, had determined that the station was not being listened to outside of the St. Petersburg area and that the station should attempt to broaden its audience in the entire area it was licensed to serve.

Based upon these findings, the Commission adopted the Examiner's conclusion that (R. 6210).

"there is no evidence of deliberate misrepresentation of any kind, or attempt at concealment from the Commission, on the part of either WTSP-TV, Inc., or any of its principals,' and 'there is no basis for a finding or a conclusion that the program service of station WLCY relied upon by WTSP-TV, Inc., at the original hearing was 'prefabricated' for improper purposes, or constituted a 'sham' designed to influence the Commission in this proceeding."

Thus, the consideration which had prompted the rehearing, and which in the Commission's view was the only element casting doubt on the grant to WTSP, was resolved entirely in the applicant's favor.

Although Gulfcoast charges that the Commission improperly assumed the "defense of its grant" as the primary purpose of the remand neither Gulfcoast nor any of the other appellants has challenged

these findings as to the bona fides of the WLCY programming. Instead they have chosen to attack the programming itself, contending that it lessens the attractiveness of the applicant and requires that a de novo comparison of the applicants be undertaken, with the more recent programming of WLCY rather than that considered at the hearing as the basis for comparison. We show in the next section of our brief that the nature of the new programming was not such as to "vitiate" the Commission's original reliance on WTSP as a responsible broadcast licensee. But the short answer to appellants' contention is that if they had desired this kind of hearing their assertions should have been made in a timely fashion. The necessary information was in the possession of Gulfcoast (and could have been known to Suncoast and Tampa) almost a year before the initial decision was released, but the matter was not raised until after the initial decision in favor of WTSP, Inc. and after the Commission had affirmed its examiner. If the withholding of relevant information until it suits the tactical convenience of the parties were to be condoned, the hearing process would of course be seriously undermined. Both the Commission and this Court have held that even where such information was not known but could have been acquired, it need not be considered after a decision has been rendered. Louis Adelman, 18 Pike & Fischer, R.R. 106(a) (1960), affirmed, Guinan v. Federal Communications Commission, 111 U.S. App. D.C. 371, 297 F.2d 782 (1961). This case, we submit, is a fortiori and under the circumstances, the Commission was plainly justified in not conducting a de novo comparison of the applicants once WTSP's good faith had been established.

B. The Commission Did Not Abuse Its Discretion In Declining To Conduct A New Comparision Of The Applicants.

Designated Issue 3(b) of the remand proceeding was conclusory in nature, calling for the Commission to determine

"Whether, and in what respects, modification of the Commission's Decision in this proceeding is required."

Within the precise confines of the ad hoc remand proceeding the Commission, after consideration of the entire remand record, found that WTSP should be exonerated from the misrepresentation charges. The determination with respect to "modification" (Issue 3(b)) necessarily was dependent upon the consideration and evaluation given to those facts pertaining to the character qualification issue. Responsive to Issue 3(b), the Commission found that no extraordinary reasons compelling modification were present in this proceeding. The absence of "extraordinary reasons" manifestly was derived from the exoneration of WTSP from the misrepresentation charges. More specifically, the absence of "extraordinary reasons" was derived from those findings bearing upon the programming services of WLCY and the reasons underlying WLCY's choice of programming -- in short, the findings in support of the character issue determination.

Nor is there merit in appellants' contention that the evidence in the remand hearing vitiated the preference accorded WTSP for past broadcast record in the earlier proceeding. The Commission's 1962 Decision reflected that the primary basis for the significant preference was that WLCY singularly, of those applicants relying on past broadcast record, demonstrated balanced

programming. Thus, with respect to Tampa, the Commission concluded (R.4819).

"Tampa's WKRG-TV 1957 Composite Week analysis reveals a serious lack of balance, with nearly 90% of the week devoted to entertainment programming, and religious, agricultural, educational, and discussion programming together accounting for only 9.95%"; 1/

with respect to Gulfcoast (R.4819):

"Consideration of Poynter's [Gulfcoast] operation of WTSP in its last three years of his ownership indicates a steadily declining operation rendering decreasing service to the public. For example, in the 1953 composite week only 62.3% was devoted to entertainment programming, and, while agricultural, educational, and discussion programs accounted for less than 2% each, the overall programming was not seriously out of balance. In 1954's composite week, entertainment had climbed to 66.5% and agricultural programming had dropped to .8%. In 1955's composite week, entertainment accounted for 73.4% of the programming, and no time was devoted to agricultural or educational matter, and only .9% to discussion";

with respect to City (R.4820):

"As to the City's operation of WSUN-TV, while performance, as reflected in the 1957-58 composite week, generally exceeded that proposed in the 1957 renewal, such is due to the fact that its proposal lacked balance. For example, no agricultural programming was proposed, and none was broadcast. Inasmuch as the operation on UHF channel 38 was unprofitable during this period due to VHF competition (although its lack of educational programming cannot be attributed to the operation of an educational station, WEDV-TV, which did not commence until after the WSUN-TV 1958 composite week), more meaningful would be a consideration

1/ In its 1964 Decision, the Commission noted that the 9.95% computation was in error and that the correct figure was actually only 2.95%, thus showing an even greater imbalance (R.6220-21)

of the record of City's standard broadcast station, WSUN. Analysis of that station's 1957-58 composite week reveals no educational or discussion programs, and only 5.8% live programming compared to the 12.5% promised in the 1957 renewal application";

and, with respect to WLCY (R.4820):

"Of the various Rahall [WTSP] operations, the operation of WLCY should be considered the most significant to our purposes here since it is in the community with which we are concerned. Such operation, when compared with Poynter's [Gulfcoast] former operation of the same facility and with City's operation of WSUN, leaves little doubt that it has best served the public interest. Its 1958 composite week revealed a greater percentage of religious, agricultural, educational, news, and discussion programs than broadcast by WTSP under Poynter, and no categories were completely ignored as was the case with both WSUN and Poynter's WTSP. Particularly noteworthy was WLCY's broadcast of 22.7% local live programming during the composite week."

Particular programs included as part of the past broadcast record, did not constitute the basis for the preference. In fact, the concept of evaluating individual programs was specifically rejected as it pertained to the program proposals (R.4814):

"Qualitatively, the Commission is somewhat reluctant to characterize one applicant's programs as better than another's, where, as here, each proposal contains a number of meritorious programs."

The Examiner's Supplemental Initial Decision made findings pertaining to specific categories of programming and programming analysis as broadcast under the new format.^{14/} Those findings showed that WLCY was providing programming in all categories and was still

^{14/} Such findings were responsive to designated Issue 1 and were necessary in order to render conclusions under Issue 2.

broadcasting extensive local live programming (R.6021-35)^{15/}.

While the Commission's 1964 decision rejected certain conclusions in the Supplemental Initial Decision based upon these findings as irrelevant to the determination of the character issue, it adopted the aforesaid Examiner's findings (Exceptions and Rulings thereon, R. 6210)^{16/}. Additionally, the 1964 decision found that the new format was a "'monitor' format, wherein news, sports, weather, and other informational and public service features were interspersed throughout the station's entertainment format" (R.6216-17) and concluded, pertinent to the resolution of the character issue, that WLCY had never abandoned its community obligation or all of its public service programming (R.621-18).

The Commission found that WTSP was still providing balanced programming under its new format and that its choice of programming was based upon the desire to broaden the station's audience. The determination under Remand Issue 3(b) not to modify the decision was based upon those facts underlying the resolution of the character issue. Those facts demonstrated the absence of any unusual or extraordinary circumstances compelling re-evaluation. Under these circumstances, the action of the Commission in finding that modification was not required represented a proper exercise of Commission discretion.

^{15/} The 1961 and 1962 composite week analysis showed 16.2% and 19.5% respectively local live programming (R. 6022).

^{16/} Exceptions to the findings of fact are found in the record at 6098-6107; 6130-6145; 7335-7405. The rulings on the exceptions are found in the record at 6224-6231.

within Section 405. Kidd v. Federal Communications Commission, 112 App. D.C. 288, 302 F.2d 873 (1962).

Appellant's reliance upon Enterprise Co. v. Federal Communications Commission, 97 U.S. App. D.C. 374, 231 F.2d 708 (1955), cert. den. 351 U.S. 920 (1956) and Butterfield Theatres, Inc. v. Federal Communications Commission, 99 U.S. App. D.C. 71, 237 F.2d 552 (1956), in which this Court directed that new evidence of changed circumstances be considered by the Commission, is misplaced. Essential to the basic distinction between these cases and this proceeding is that here the Commission on its own motion ordered a remand and fully evaluated the "changed" condition within the scope of the remand issue. Thus, the lack of due process with which this Court was concerned in Enterprise and Butterfield, has more than been accorded in this case.

It should be noted also that the character of the alleged "changed circumstances" here differs markedly from those cases. In Enterprise, applicant Beaumont received a determinative preference over applicant KTRM under the comparative criterion of diversification and concentration of control because of the presence in the KTRM application of an option agreement to one W. P. Hobby, a newspaper and broadcast station owner. By a post grant agreement, Hobby acquired an option to purchase ownership interest in the successful applicant Beaumont. As a consequence of this shift, the winning applicant became burdened with the very liability which had attached to its opponent in the hearing. Under this circumstance, remand and re-evaluation was deemed necessary to protect the rights of the competing applicants. The Butterfield proceeding resulted in a remand

because of changes pertaining to the successful applicant's proposals bearing upon the likelihood of effectuation and on which it had received preferences.^{17/}

Here no changes in the composition of the successful applicant or in its television proposal have occurred. Instead, following the grant, the Commission was apprised of matters which might bear on the applicant's character, a hearing was conducted, all parties were heard, and the issue was resolved in the applicant's favor. The only changed circumstance here relates to the programming of Radio Station WLCY. On this point there is no question but that the station had in fact broadcast the programs relied on at the original hearing and the findings show that WTSP was still broadcasting balanced programming under its new format thereby lending assurance that WTSP was still the more likely to effectuate its proposals. Accordingly, no further re-evaluation was required. Kentucky Broadcasting Corp. v. Federal Communications Commission, 84 U.S. App. D.C. 383, 174 F.2d 38 (1949); Interstate Commerce Commission v. City of Jersey City, 322 U.S. 503 (1943); United States v. Pierce Auto Lines, 327 U.S. 515 (1946).

^{17/} The change in proposals related to transmitter site, programming and studio building.

Finally, we would urge that the doctrine of administrative finality supports the Commission's action in terminating this proceeding where it did, and is under the circumstances of this case, a factor entitled to considerable weight.

As we have already pointed out, the facts which formed the basis for the petitions for rehearing and reopening of the record in February, 1962, were known or were available prior to the issuance of the first initial decision on February 1, 1961 (R. 5044-5048) (R. 6066-6067). Nevertheless, appellants did not seek to reopen the record. Oral argument was held on Exceptions to the Initial Decision in July, 1961, but no mention was made of these facts. Not until February, 1962, after issuance of the first Commission Decision granting the application of WTSP, did appellants bring to light the facts concerning the change in format. For this reason the Commission denied the petitions for rehearing and reopening of the record on the basis of timeliness, although it reopened the record on its own motion.

Following this remand order, the Commission's Review Board (pursuant to a WTSP petition for clarification of issues) narrowly construed the scope of the remand issues -- stating that re-evaluation was not contemplated. No appeal from this order was taken.

Pursuant to the remand order, an evidentiary hearing was conducted and a supplemental initial decision issued resolving the character issue in favor of WTSP. The decision expressly limited

the scope of the remand hearing to resolution of the character issue. Appellants did not except. Oral argument was held on exceptions and the second Commission decision issued affirming the supplemental initial decision.

Considering the protracted history of this proceeding, involving some seven years of litigation including a remand proceeding that completely absolved WTSP and during which time the Tampa - St. Petersburg area had only two VHF television stations, the Commission was justified in applying the doctrine of administrative finality. Kidd v. Federal Communications Commission, supra. Most important to the application of administrative finality to this proceeding is the fact that a remand was held and no extraordinary reasons were found warranting further action. But also significant are the facts that appellants have, by their own choice, delayed utilizing the procedural means available; first, in failing to assert the allegations respecting the format change when first learned; and second, in waiting until after issuance of the Commission's second decision to urge re-evaluation.

In Butterfield, supra, this Court pointed out that delay in seeking to reopen the record is a factor to be weighed in the exercise of the Commission's discretion. In that case the facts supporting the petition to reopen were kept secret from appellants, and the delay was deemed excusable. But here it was inexcusable; appellants' inaction in waiting to assert the programming changes

and the need for re-evaluation was deliberate and tactical. Under the circumstances, and in light of the steps which the Commission took on its own motion to vindicate the public interest, administrative finality was a consideration on which the Commission could properly rely in finalizing the grant to WTSP.

II. GULFCOAST'S ATTACK ON THE COMPARATIVE CRITERIA IS NOT PROPERLY BEFORE THIS COURT. IN ANY EVENT, THE CONCLUSIONS REACHED ARE NOT SUPPORTED BY THE DATA IT HAS SUBMITTED.

Gulfcoast contends for the first time that the decision must be reversed or remanded on the basis that the Commission's comparative criteria is arbitrary and capricious. Such belated attack on the comparative criteria, in view of the circumstances preceeding this appeal, can be fairly characterized as ironic. Commencing with the comparative hearing in 1958 and continuing through the oral argument before the Commission in April, 1964, Gulfcoast has asserted that it should be preferred under the comparative criteria that it now so vigorously contends is arbitrary and capricious.

Appellant's allegation neither has been presented at any previous level before the Commission nor raised in its notice of appeal to this Court. In Unemployment Compensation Commission of Alaska v. Aragon, 329 U.S. 143, 155 (1946), the Supreme Court stated:

"A reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore presented and deprives the Commission of an opportunity to consider the matter, make its ruling, and state the reason for its action."

This Court has consistently applied this principle in refusing to consider allegations presented for the first time on judicial

review. See Albertson v. Federal Communications Commission, 100 U.S. App. D.C. 103, 243 F.2d 209 (1957); Democrat Printing Co. v. Federal Communications Commission, 91 U.S. App. D.C. 72, 202 F.2d 298 (1952). As in the foregoing cases, the disposition of Gulfcoast's new argument is controlled by Section 405 of the Communications Act, providing inter alia:

"The filing of a petition for rehearing shall not be a condition precedent to judicial review of any such decision, order, or requirement, except where the party seeking such review . . . (2) relies on questions of fact or law upon which the Commission has been afforded no opportunity to pass . . ." (Emphasis added).

Gulfcoast is in effect challenging the basis on which scores of AM, FM and television licenses have been granted by the Commission and upheld by this Court. See for example Scripps-Howard Radio, Inc. v. Federal Communications Commission, 89 U.S. App. D.C. 13, 189 F.2d 677 (1951); Pinellas Broadcasting Co. v. Federal Communications Commission, 97 U.S. App. D.C. 236, 230 F.2d 204 (1956); Community Telecasting Corp. v. Federal Communications Commission, 115 U.S. App. D.C. 101, 317 F.2d 592 (1963). Considerations governing a choice between a number of qualified applicants is a matter which has clearly been committed by the Congress to the expertise of the Commission. If Gulfcoast or any other person feels that considerations different from those heretofore applied should control that choice, then surely the proper course is to advance those considerations before the agency. This it has failed to do. The Commission has had no opportunity to pass on its contentions and, accordingly, the matter should not be considered by

this Court.

In any event, we think it apparent that based upon the data relied upon by Gulfcoast, conclusions (either good or bad) concerning the merits of the comparative criteria cannot properly be drawn. Gulfcoast bases its attack on the method of selecting applicants by setting forth selected data from renewal applications of some 35 winning applicants in comparative hearings. It asserts that the "promise v. performance" record of these 35 licensees sustains its contention that the Commission's method of selection is arbitrary and capricious.

Assuming, arguendo, that "promise v. performance" is a valid yardstick for measuring the effectiveness of the Commission's method of selecting an applicant, no meaningful conclusion can be drawn unless the underlying reasons for the difference between promise and performance are known. For example, justifiable reasons for the difference may be found where the licensee has determined after survey that its programming was no longer serving the needs of the community; where the licensee has become a network affiliate, or conversely, an independent, or where it has merely changed networks; where weekly operating hours are lengthened (as is often the case) with the result that the licensee may be providing as much or more public service programming in terms of hours, but less in terms of percentage; where a change in economic conditions occur - causing a reduction in revenue and a concomitant reduction in sustaining and local broadcasting; where specialized broadcast stations, such as educational television station, enter the market.

These aforesaid examples are not offered for the purpose of justifying the departures from programming proposals purportedly shown by the Gulfcoast survey nor do they comprise an exhaustive list of the kinds of explanations for such departures that might under appropriate circumstances be deemed reasonable. On the contrary, the examples are set forth merely to demonstrate the inadequacy of "promise v. performance" data standing alone. A more fundamental difficulty involves the validity of the "promise v. performance" test itself, to which Gulfcoast's analysis is admittedly confined. The goal of the comparative hearing process, of course, is to select the best qualified applicant under the "public interest, convenience and necessity standard." Adherence to program representations, like adherence to commitments made in other areas, is ordinarily regarded as an important element of the public interest, and substantial unjustified departures therefrom are of concern to the Commission. See Loyola University, 24 Pike & Fischer, R.R. 766 (1963); Tidewater Teleradio, Inc., 24 Pike & Fischer, R.R. 653. But a host of other factors also enter into such a determination. Thus, a bare statistical comparison, disclosing percentage differences in certain program categories between the programming presented and that proposed in the application, is hardly conclusive that the public interest has not been served by the Commission's selective process.

While we do not deny that appellant has set forth a provocative discussion of the comparative hearing process, the information relied on is clearly much too incomplete to support the sweeping conclusions reached. Thus, aside from the fatal procedural defects already referred to, we believe no fundamental weakness in the Commission's selective process has been established that would warrant a setting aside of its opinion in this case.

III. WTSP SHOULD NOT BE DISQUALIFIED
OR RECEIVE A COMPARATIVE DEMERIT.

A. Alleged Ex Parte Contacts.

Gulfcoast urges that the Commission erred, regarding a brochure acclaiming the public service activities of WTSP, in concluding that (R. 4825):

"There is no evidence that the action was intended to influence the Commission in the instant case, and all other applicants have been afforded, and have taken full advantage of the opportunity to respond to the matters contained in the brochure. The matter appears to be no more than a case of over-zealous public relations activity".

The Examiner found that the document in question^{18/} was prepared as the result of a suggestion made at the 1956 convention of the National Association of Broadcasters and that in January, 1958, copies were distributed to the national representatives of the Rahall stations, members of the FCC, individual Rahall station managers and to WTSP's Washington counsel (R. 4609).

The brochure was not prepared for the benefit of the Commissioners or the hearing; it received wide distribution within the Rahall organization and its representatives; it was forwarded to the Commissioners prior to the date commencing the adjudicatory phase of this proceeding; and it was introduced in evidence during the original hearing (WTSP Hearing ex 3, R. 2742-3022) and subjected to cross-examination.

In considering on review the propriety of the Commission's conclusions concerning character qualifications, this Court held in

18/ Entitled Selected and Outstanding Public Service Accomplishments for the Year 1957 by the Rahall Stations.

Kidd v. FCC, supra, 289:

"With questions of the present sort, centering on the character of an applicant, our function is primarily to see whether the Commission's judgment, based on the record as a whole, is reasonable and within its proper discretion. Cf. Federal Communications Commission v. WOKO, Inc., 329 U.S. 223, 229, 67 S. Ct. 213, 91 L. Ed. 204 (1946). Here, the Commission considered and adequately dealt with the major contentions advanced by appellant. Within fairly broad limits, the relative weight to be given to all the relevant factors presented must lie in the sound discretion of the Commission."

The factual circumstances surrounding the brochure bear no resemblance to the influence peddling existent in WKAT, Inc., v. FCC, 111 U.S. App. D.C. 253, 296 F.2d 375 (1961), cert. den. 368 US. 841 (1961) and Massachusetts Bay Telecasters, Inc. v. FCC, 111 U.S. App. D.C. 144, 285 F.2d 121 (1961), relied upon by Gulfcoast. The brochure was sent prior to the hearing, the evidence as to its preparation and distribution refutes any inference as to improper motivation, and no prejudice to any party was shown or in fact claimed. The Commission's conclusion as to the significance of this matter was an entirely reasonable judgment based on the evidence of record.

B. Logging and Programming Mis-classification Practices.

Gulfcoast further asserts that WTSP should be disqualified or receive a comparative demerit because of loose logging and programming classification practices. The Commission's 1962 decision dealt with this matter in detail.

It found that the alleged program mis-classification practices arose primarily from the fact that some programs overlap several classification definitions and ". . . there is no evidence of an attempt to mislead the Commission as to the true nature of the licensee's performance." (R. 4819). Certain of the alleged logging violations were found not to be violations at all. Others were found from an overall comparative standpoint to lose significance in view of similar failures by other applicants and WTSP's generally good past broadcast record. With respect to the charge that the logging practices at one of the Rahall stations was intended to mislead the Commission, the Commission stated (R. 4819):

"It is charged that WFEA's addition of non-commercial spot announcements to the logs was with the intent to mislead the Commission. Such an intent is directly refuted by reference to the WTSP-TV exhibit in question, where, in its analysis of the composite week, it shows only 62 non-commercial spots, and in a footnote thereto, notes that it is the practice of its announcers to insert additional public service announcements in recorded music programs, and that approximately 80 such announcements were carried during the 1957 composite week but not entered on the logs."

The record demonstrates a careful and complete consideration of the facts underlying the Gulfcoast allegations, and the conclusion reached by the Commission was manifestly reasonable. The Court has consistently refused to substitute its judgment for that of the Commission in matters of this kind, and there is clearly no basis for doing so here. Pinellas Broadcasting Co. v. FCC, 97 U.S. App. D.C. 236, 230 F.2d 204 (1956), cert. den. 350 U.S. 1007 (1956).

CONCLUSION

For the foregoing reasons, the decisions in this case should be affirmed.

Respectfully submitted,

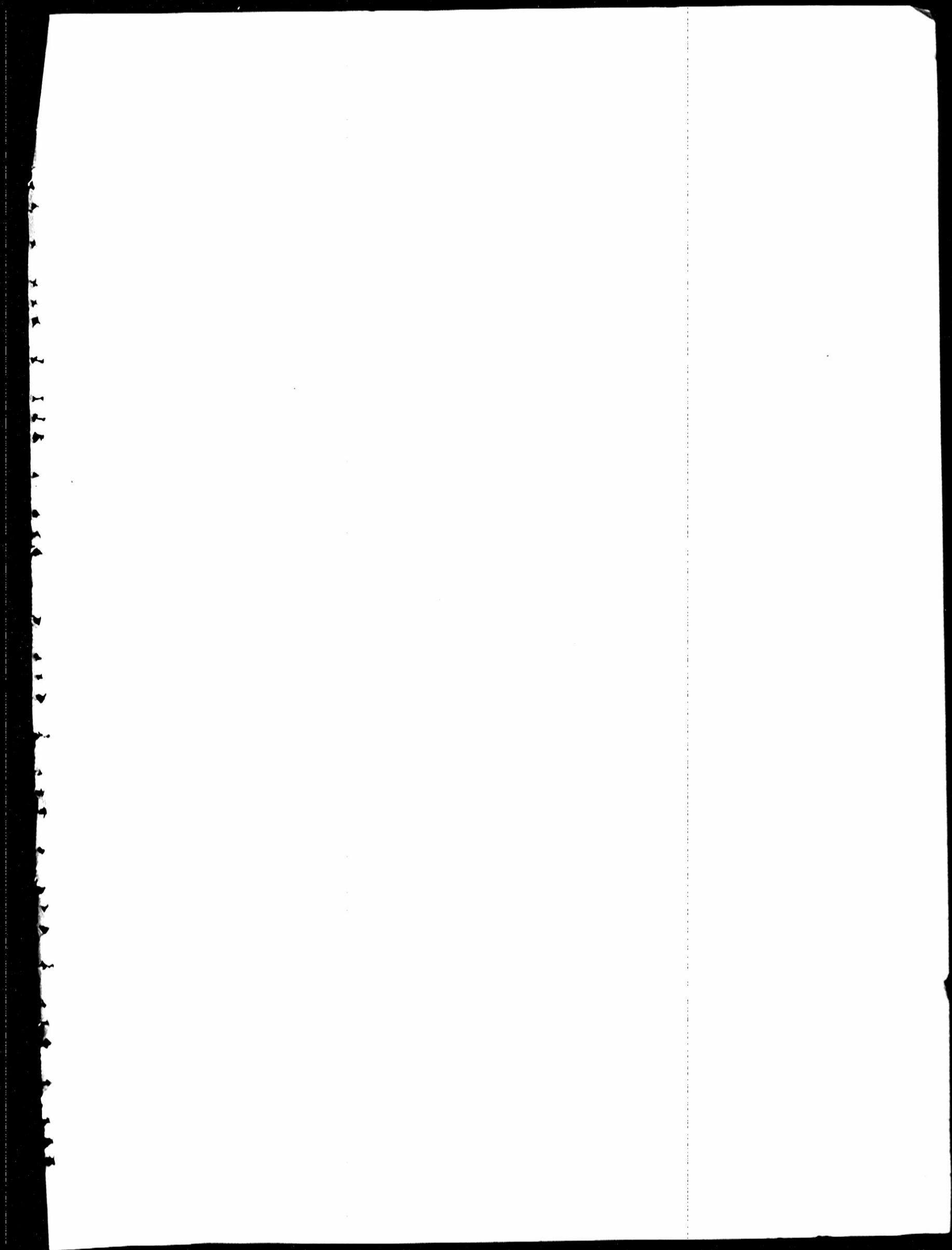
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Washington, D.C. 20554

June 11, 1965.



BRIEF FOR INTERVENOR
WTSP-TV, INC.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,048

FLORIDA GULFCOAST BROADCASTERS, INC.,
Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee
WTSP-TV, INC.,
Intervenor

No. 19,172

SUNCOAST CITIES BROADCASTING CORP.,
Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee
WTSP-TV, INC.,
Intervenor

No. 19,175

TAMPA TELECASTERS, INC.,
Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee
WTSP-TV, INC.,
Intervenor

*Appeals From Decisions and Orders of the
Federal Communications Commission*

United States Court of Appeals
for the District of Columbia Circuit

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(i)

STATEMENT OF QUESTIONS PRESENTED

Intervenor believes that the following questions are presented for decision in one or more of the consolidated appeals in this case:

1. Whether in the remand hearing in this proceeding the Commission committed error in the following respects:

- (a) In failing to conclude that the evidence in the remand hearing required the withdrawal of the "significant preference" for past broadcast record awarded to the winning applicant (WTSP-TV) in the original hearing; and
- (b) In refusing to reevaluate all applicants for a new television station license for Channel 10 at Largo, Florida, on a comparative basis in light of the entire record in this proceeding.

2. With respect only to the appeal in Case No. 19,048, whether the Commission committed error in the remand hearing in the proceeding by reason of its failure to conclude that the winning applicant (WTSP-TV) in the original hearing was absolutely disqualified on character grounds from receiving the television facility for Channel 10 at Largo, Florida.*

* Other questions argued in the briefs of the Appellants were either not presented to the Commission in the proceedings leading to these appeals, not preserved in the notices of appeal filed in this Court, or both.

(iii)

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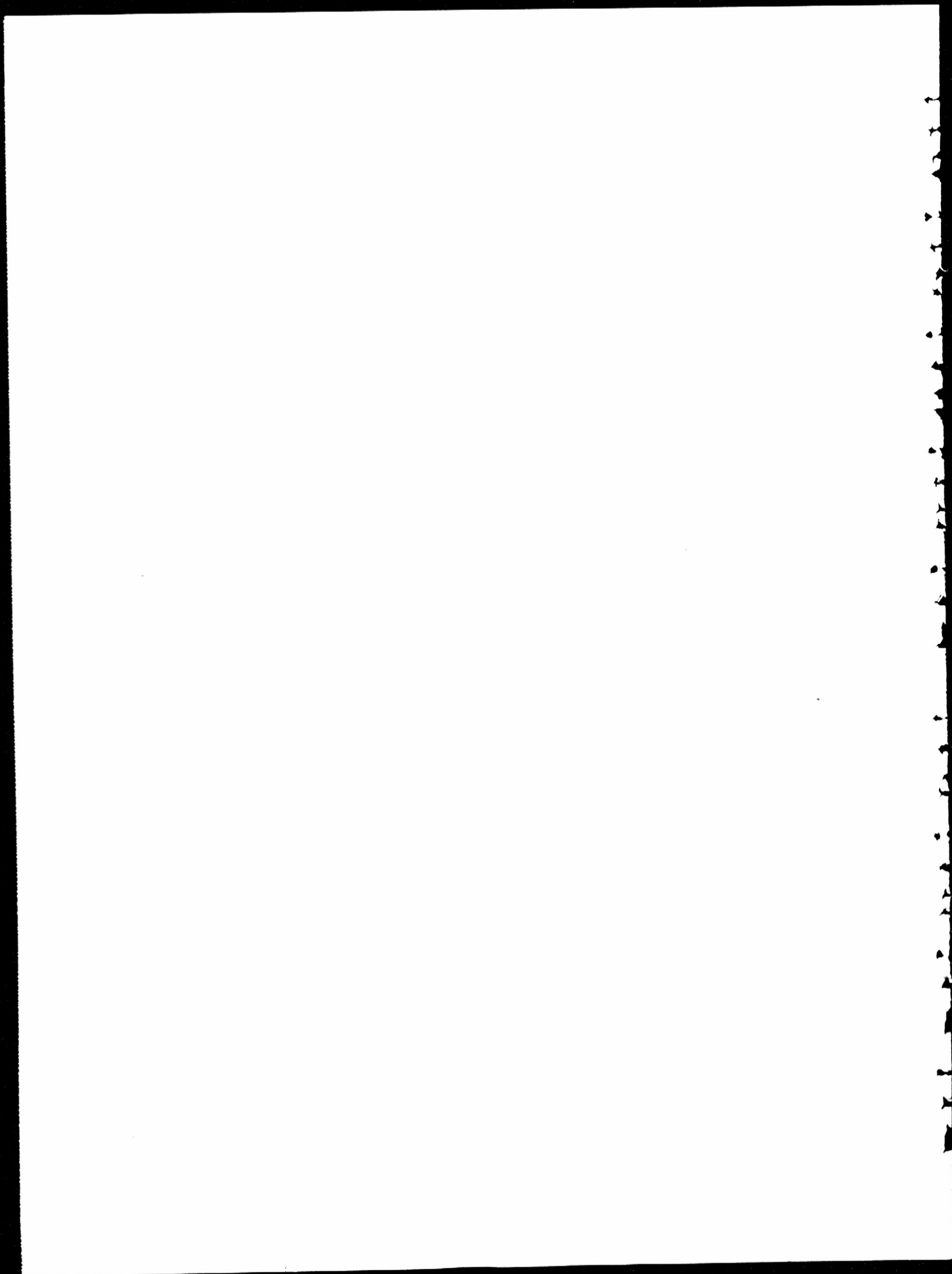
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Appeals From Decisions and Orders of the
Federal Communications Commission

BRIEF FOR INTERVENOR WTSP-TV-INC.

COUNTERSTATEMENT OF THE CASE

These appeals bring before the Court two decisions of Appellee, the Federal Communications Commission, both rendered after extensive evidentiary hearings. The first decision awarded a Construction Permit to Intervenor WTSP-TV, Inc.¹ for a new television station at Largo, Florida; and the second affirmed that award after further hearings ordered by the Commission on its own motion. Appellants do not seriously challenge the proceedings leading to the first decision, and the issues properly presented for review are confined to the Commission's disposition of the further proceedings it subsequently ordered under § 405 of the Communications Act of 1934, as amended, 47 U.S.C. § 405. The lengthy and involved administrative proceedings below are summarized in the brief of Appellee being filed simultaneously herewith, and need not be repeated *in extenso* here. As is apparent from that summary, this case was one of the most vigorously contested comparative television hearings to come before the Commission in recent years.

In May 1958, the Commission designated six pending applications for new television stations on Channel 10 in the Tampa-St. Petersburg area for consolidated hearings under the so-called "standard comparative issue" (R. 288-290).² Voluminous written evidence was offered by the applicants in support of their respective proposals, and oral testimony was taken by the Examiner from more than fifty witnesses over a

¹ Since the filing of the appeals, the corporate name of Intervenor WTSP-TV, Inc. has been changed to WLCY-TV, Inc., and the Commission has authorized use of the call letters WLCY-TV for Intervenor's new television station. However, in order to avoid confusion and to be consistent with Appellants' briefs, Intervenor will be referred to throughout this brief as "WTSP-TV, Inc."

² Neither Appellant Florida Gulfcoast (hereinafter Gulfcoast) nor any other party challenged during the proceedings below the propriety of applying the Commission's traditional comparative criteria to the six applicants in order to determine which would best serve the public interest.

period of approximately sixty days in 1959 and 1960. Thereafter all applicants filed proposed findings and conclusions, each urging that its proposal should be preferred on a comparative basis. On February 1, 1961, the Hearing Examiner released an Initial Decision, 134 single-spaced pages in length, in which, after detailed comparison of all six applications, he concluded that the proposal of Intervenor WTSP-TV, Inc. was superior to the five other applications in virtually every significant feature (R. 4556-4689).³

Exceptions to the Initial Decision were filed in April, 1961 by the other five applicants — each of which argued that it should have been favored under the normal comparative criteria which have traditionally been used by the Commission. Oral argument was heard by the Commission *en banc* in July, 1961, and in January, 1962, the Commission released its decision affirming the Examiner and granting Intervenor's application, with two Commissioners dissenting (R. 4810-38).

In February, 1962, four of the other five applicants filed petitions for reconsideration and/or motions to reopen the record as allowed by § 405 of the Communications Act. With few exceptions, the petitions for reconsideration were repetitious of arguments previously urged to the Commission by the same parties on exceptions to the Initial Decision. The motions to reopen the record, on the other hand, were based on allegations that program and personnel changes which had been put into effect in 1960 (almost two years earlier) at radio station WLCY, St. Petersburg, controlled by the principals of WTSP-TV, Inc., established that WTSP-TV, Inc.'s original evidentiary presentation to the Examiner concerning the past operating record of WLCY had been a sham, and that WTSP-TV, Inc. was no longer capable of operating its proposed television station in accordance with its application.

³ The Examiner gave WTSP-TV, Inc. preference, in comparison to one or more of the competing proposals, for more meaningful integration of ownership with management, more thorough planning and preparation for television, a better overall television program proposal, and a superior past broadcast record in the AM radio field (R. 4687).

By order released June 29, 1962, the Commission found that the facts relied on by Appellants as grounds for reopening of the record had all been known to them long before release of its decision, and denied their motions to reopen as untimely. At the same time, however, the Commission deferred action on the petitions for reconsideration and on its own motion ordered a further evidentiary hearing to determine whether the program changes at WLCY reflected adversely on the character qualifications of WTSP-TV, Inc., and, in light of the facts developed at the remand hearing, "whether, and in what respects, modification of the Commission's Decision in this proceeding is required" (R. 5044-48).

Pursuant to the Commission's remand order, further evidentiary hearings were held before the Examiner in 1962 and 1963, and the testimony of an additional twenty-eight witnesses was taken. At the outset of this further hearing, WTSP-TV, Inc. sought from the Commission's Review Board a clarification of the remand hearing issues (R. 9636-49). By Memorandum Opinion released December 27, 1962, the Board construed the *ad hoc* remand hearing as requiring only a determination of whether the program changes at WLCY reflected adversely on the character qualifications of WTSP-TV, Inc., and held specifically that the "limited issues framed by the Commission do not provide for updating [the record] and/or comparative [re-]evaluation" (R. 5108-13). None of the other applicants either appealed from this order or noted an exception to the Review Board's opinion in later proceedings before the Commission pursuant to the provisions of § 1.115 of the Commission's Rules, 47 C.F.R. § 1.115.

By Supplemental Initial Decision released August 30, 1963, the Hearing Examiner found that the program changes instituted at radio station WLCY in 1960 had been the result of a sincere effort by its owners to improve the effectiveness of its service to the public, and had in fact achieved the desired result. The Examiner further found and

concluded that the programming of the radio station as to which WTSP-TV, Inc. had offered evidence at the original hearing had been carried in good faith, and that since 1960 the station had continued to provide meritorious public service to its community and surrounding areas and had discharged its public service undertakings to the Commission at least as fully, if not more so, as at the time of the original hearing. Finally, he found that none of the WLCY program or personnel changes relied on by the other applicants had impaired WTSP-TV, Inc.'s ability to effectuate its original television proposal. In light of all these conclusions the Examiner recommended that the Commission affirm its original award to WTSP-TV, Inc. and terminate the proceedings (R. 6016-81).

Voluminous exceptions were filed to the Examiner's second Initial Decision, and the Commission again heard oral argument in the case. After these extensive further review proceedings, the Commission released a second decision on November 6, 1964, affirming its own and the Hearing Examiner's two earlier recommendations that the WTSP-TV, Inc. application should be granted (R. 6208-36).⁴ In its second decision the Commission adopted, as "substantially accurate and complete" (R. 6210), the Examiner's findings concerning the evidence adduced at the remand proceedings, as well as his conclusion that its original preference to WTSP-TV, Inc. remained unimpaired and valid. The Commission also found specifically that "at no point [since the earlier hearing] did station [WLCY] abandon its obligations to the community or all of its public service programming," as had been alleged in the motions to reopen the record (R. 6217-18). Finally the Commission took up, on a comparative basis, the motions for reconsideration of its original decision on which it had deferred action pending the remand proceedings,

⁴ The Commission's second decision was by a four to one vote, with Commissioner Bartley dissenting solely on the grounds advanced by him two years earlier in his dissenting opinion in favor of the City of St. Petersburg.

and found that, with a few exceptions which it held to be without merit, the petitions were entirely repetitious of matters it had already fully considered (R. 6219-22).

In thus disposing of the proceedings, the Commission ruled on all grounds for reconsideration of its original comparative decision advanced in the petitions for reconsideration, and decided adversely to Appellants each of their contentions relating to WLCY's past programming. Its decision to affirm the grant to WTSP-TV Inc. was explicitly "based upon the entire record" (i.e., of both the original and the remand hearings) (R. 6210). The Commission also expressly held that its review of the record disclosed no basis for reevaluation of all six applicants "from a *de novo* standpoint," especially in view of the considerable period of time which had been consumed by the proceedings and the desirability of reaching a final decision in the case (R. 6221-22).

Two of the five other applicants, the City of St. Petersburg and Bay Area Telecasting Corporation, did not seek further review of the Commission's decision affirming its earlier award to WTSP-TV, Inc. Gulfcoast filed an appeal directly with this Court. The remaining two applicants, Tampa Telecasters (hereinafter Telecasters) and Suncoast Cities (hereinafter Suncoast) sought further reconsideration by second petitions pursuant to §405 of the Communications Act. These petitions were denied by Memorandum Opinion of the Commission released January 13, 1965, in which it found that petitioners raised no contentions not previously disposed of in its earlier decisions (R. 6261-2). Following release of this opinion, Telecasters and Suncoast filed timely notices of appeal in this Court. Gulfcoast noted no appeal from the Commission's final order in the proceedings below.

The findings and conclusions supporting the four separate Initial and Commission decisions in this case, all favoring a grant of the WTSP-TV, Inc. application, as well as the substantial evidence on which

those decisions rested, are discussed, to the extent they are relevant to the narrow questions presented in these appeals, in the course of the Argument, *infra*.

SUMMARY OF ARGUMENT

1. The only substantial question presented by these appeals is whether the Commission's disposition of Appellants' motions for rehearing and reconsideration satisfied the requirements of §405 of the Communications Act, 47 U.S.C. §405. This question must be answered in the affirmative. Despite the inexcusable untimeliness of the petitions for rehearing the Commission reopened the record and held a full inquiry into Appellants' allegations concerning the program changes at WLCY. After resolving this matter in favor of WTSP-TV, Inc., the Commission then proceeded to consider Appellants' motions for reconsideration in light of the entire record before it and on a comparative basis. The foregoing actions fully protected Appellants' hearing rights and the public interest. Having disposed of the only questions raised in the motions for rehearing and reconsideration adversely to Appellants' position, the Commission was under no obligation to reevaluate the applications before it from an entirely *de novo* standpoint. The scope of the rehearing was specifically set forth by the Commission in its remand order, and Appellants did not except to the Review Board's construction of the rehearing issues. The evidence taken on remand not only refuted Appellants' charges of bad faith against WTSP-TV, Inc. but also established that the service provided by radio station WLCY since the earlier hearing was fully as meritorious as during the period on which the Commission's original decision was based. Indeed, Appellants do not seriously challenge the Examiner's findings to this effect. Finally, Appellants at no point claimed that events transpiring since the original hearing had improved their own applications in any significant respect. Absent unusual circumstances, the public interest is served by orderly termination of protracted administrative proceed-

ings such as those here involved, and the Commission was entitled to take into account the principle of administrative finality, as well as the foregoing factual considerations, in exercising its discretion not to embark on a new comparative hearing. None of the authorities relied on by Appellants is to the contrary.

2. The additional issues concerning WTSP-TV, Inc.'s basic qualifications, raised only in the Gulfcoast appeal, are also without substance. Even assuming that Gulfcoast had appealed from the Commission's final order in the proceedings below, which it did not, its contentions that WTSP-TV, Inc. should have been disqualified because of log-keeping practices and/or alleged improper representations to the Commission prior to commencement of the hearings relate entirely to evidentiary matters which were carefully considered by the Examiner and the Commission, and their disposition of Gulfcoast's allegations is amply supported by the evidence.

3. Gulfcoast's afterthought argument that this case should be remanded because the comparative criteria traditionally used by the Commission are inherently arbitrary was neither presented to the Commission nor preserved in Gulfcoast's notice of appeal, and hence is not a matter which should be passed on by the Court at this juncture. In any event, Gulfcoast's contentions in this respect must be rejected under a long line of contrary decisions by this Court, including one in which Gulfcoast's principals were the unsuccessful appellants almost ten years ago. *Pinellas Broadcasting Co. v. FCC*, 97 App. D.C. 236, 230 F.2d 204 (1956), *cert. den.*, 350 U.S. 1007 (1956).

ARGUMENT

- I. The remand hearing ordered by the Commission on its own motion after its original decision, and its subsequent disposition of Appellant's petitions for reconsideration, fully satisfied the requirements of the Communications Act, and Appellants' argument that they were entitled to *de novo* comparative consideration is without merit.

Although the record leading to these appeals was unusually long and the case was vigorously contested, Appellants have chosen to raise before this Court only a single substantial issue, i.e., whether the *ad hoc* rehearing the Commission ordered on its own motion, after its first decision, and its subsequent denial of Appellants' petitions for reconsideration of that decision, conformed to applicable standards for agency action and the requirements of § 405 of the Communications Act, 47 U.S.C. § 405. These appeals do not present any challenge to the procedures followed at the original hearings, nor do Appellants urge that the findings of the Examiner and the Commission in their first decisions preferring WTSP-TV, Inc. on a comparative basis were not supported by substantial evidence. Similarly, Appellants do not assert procedural error in the Commission's actions staying its first decision and ordering further hearings on their allegations that WTSP-TV, Inc.'s evidence concerning radio station WLCY was intended to mislead the Commission. (Indeed, they are scarcely in a position to do so, since the Commission held the further proceedings they requested, and allowed them to participate fully, despite the fact that they relied on evidence which had been in their possession *for almost two years* before they first brought it to the Commission's attention.)⁵ Finally,

⁵ Appellants' unexplained delay in bringing the WLCY program changes on which they later relied for a reopening of the record to the Commission's attention before its original decision would have fully justified the Commission in declining to hold any further proceedings at all or in limiting Appellants' participation in the *ad hoc* further hearing it did order. Cf. *Guinan v. FCC*, 111 App. D.C. 371, 297 F.2d 782 (1961); *Kentucky Broadcasting Corp.* (Continued, next page)

Appellants do not contend that the findings made by the Hearing Examiner on the evidence taken during the remand proceedings are contrary to the record or otherwise erroneous.

Having thus abandoned virtually all of the numerous allegations of error they urged before the Commission during the long course of the proceedings below, Appellants have seen fit to confine the issue on appeal to the narrow question of whether, after reviewing the remand evidence and the Examiner's supplemental Initial Decision, and after reconsidering its original comparative assessment of the applicants in light of the arguments in Appellants' motions for reconsideration, the Commission correctly concluded (as had the Examiner) that its original grant to WTSP-TV, Inc. should be affirmed without embarking on a *de novo* reassessment of the comparative qualifications of all six applicants. It is apparently Appellants' novel position that such *de novo* comparative reevaluation was required by this Court's opinion in *Johnston Broadcasting Co. v. FCC*, 85 App. D.C. 40, 175 F.2d 351 (1949) — the only authority cited in the briefs of all three Appellants — despite the fact that the *Johnston* case concerned the essentials for agency findings in an *original hearing pursuant to § 309 of the Communications Act*, and had nothing whatsoever to do with the extent to which such findings must be restated and reevaluated in a later proceeding under § 405 of the Act.

Insofar as it is pertinent to these appeals, § 405 of the Communications Act provides as follows:

"After a decision. . .has been made. . .by the Commission. . .any party. . .may petition for rehearing. . .and it shall be lawful for. . .the Commission. . .

(Fn. 5, continued)

v. FCC, 84 App. D.C. 383, 174 F.2d 38 (1949). As this Court stated in *Colorado Radio Corp. v. FCC*, 73 App. D.C. 225, 227, 118 F.2d 24, 26 (1941), "we cannot allow [an] appellant to sit back and hope that a decision will be in its favor, and then, when it isn't, to parry with an offer of more evidence. No judging process in any branch of government could operate efficiently or accurately if such a procedure were allowed."

in its discretion, to grant such a rehearing if sufficient reason therefore be made to appear. . . . The Commission. . . shall enter an order with a concise statement of the reasons therefor, denying a petition for rehearing or granting such petition, in whole or in part, and ordering such further proceedings as may be appropriate. . . . Rehearings shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission . . . believes should have been taken in the original proceeding shall be taken on any rehearing."

The following discussion will demonstrate that the Commission scrupulously complied with the requirements of §405 in its treatment and disposition of (1) the motions for rehearing and (2) the petitions for reconsideration, both filed after release of its decision in January, 1962, and that no more was required in the circumstances of this case.

A. *The remand hearing exposed Appellants' charges as factually unfounded and confirmed the validity of the original grant.*

Appellants' complaint that the Commission in some way denied them due process by not granting a new comparative hearing almost three years after its original decision proceeds from the common factual premise that the evidence taken at the remand hearing "vitiating" (Gulfcoast Br., p. 23), "swept away" (Telecasters Br., p. 13), or "struck down" (Suncoast Br., p. 7) the factual basis for its earlier award of a past program preference to WTSP-TV, Inc., and consequently left the WTSP-TV, Inc. application ineligible for reinstatement absent an entirely new comparative decision. Unfortunately for Appellants' position, this premise is contrary to findings and conclusions of both the Examiner and the Commission, which are in turn supported by substantial evidence not seriously challenged by Appellants. Since the factual validity of this sweeping contention by Appellants is essential to their

claim of procedural irregularity, and since Appellants' briefs contain only passing references to the pertinent evidence, Intervenor believes that it may be of assistance to the Court to summarize briefly the portions of the record bearing on Appellants' contention.

1. The original past broadcast preference to WTSP-TV, Inc.

The evidence at the original hearing showed that the Rahall brothers owned and operated five radio stations, including station WTSP at St. Petersburg, Florida (call letters later changed to WLCY) (R. 4594-5).⁶ As part of its direct case, WTSP-TV, Inc. offered exhibits showing the extent to which these radio stations had complied with their past program representations to the Commission in renewal applications (their "promise *versus* performance" record), as well as evidence establishing that each broadcasts on a regular basis significant amounts of local live, public service program material and information of concern to local civic, charitable, fraternal, governmental, and other worthwhile organizations (R. 2742-3060).

In his original Initial Decision, the Hearing Examiner entered detailed findings on the evidence which had been submitted by the applicants to the extent that it established a record of adherence — or lack thereof — to program promises to the Commission. In the case of WTSP-TV, Inc., he found (1) that "a comparison of the promises set forth in the renewal applications [of the five Rahall] stations and the performance disclosed by an analysis of the composite weeks showed that there was substantial compliance with the programming proposed" (R. 4684-5); (2) that the Rahall stations have consistently "made broadcast time available to a wide variety of civic, cultural, educational, religious, agricultural, governmental, fraternal, welfare and political organizations and groups within their service areas" (R. 4610); and

⁶ During the hearing one of the five stations was sold (R.4594). The Rahall brothers still control the remaining four.

(3) that "the findings show that WTSP-TV has been more responsive to the St. Petersburg local program interests and needs, and has more nearly adhered to its representations to the Commission for programming to that area [than the other applicants]" (R. 4685). Finding that none of the other applicants had established comparable records in the broadcast field,⁷ he concluded that WTSP-TV, Inc. was entitled to a significant preference on the comparative factor of past broadcast performance (R. 4686).

The Commission's decision affirming the Examiner specifically approved his findings concerning the enviable record of the Rahall radio stations. The Commission summarized its conclusions as follows (R. 4819, 4820-1):

"Our consideration of the past broadcast records of the four applicants relying on such convinces us that the Examiner properly concluded that WTSP-TV's was the best. . . Of the various Rahall operations, the operation of WLCY should be considered the most significant to our purposes here since it is in the community with which we are concerned. Such operation, when compared with Poynter's former operation of the same facility and with City's operation of WSUN, leaves little doubt that it has best served the public interest. Its 1958 composite week revealed a greater percentage of religious, agricultural, educational, news and discussion programs than broadcast by WTSP under Poynter, and no categories were completely ignored as was the case with WSUN and Poynter's WTSP. Particularly noteworthy was WLCY's broadcasting of 22.7% local live programming during the composite week. . . In summary of the foregoing, the Commission con-

⁷ One of the Appellants, Suncoast, elected not even to rely on the past record of its principal owners as Commission licensees, a fact which the Commission later found "raises serious questions as to [Suncoast's] general responsibility . . ." (R. 4818).

cludes that of the applicants relying upon past broadcast records, WTSP-TV is entitled to a significant preference. . ."

It will be noted that, in connection with their original past broadcast preference to WTSP-TV, Inc., neither the Hearing Examiner nor the Commission made findings on, or gave credit to, the Rahall radio stations for specific individual programs carried by the stations or for the particular format under which the stations' programming was presented. Rather, the WTSP-TV, Inc. preference was based on the stations' commendable "promise *versus* performance" record and on the overall public service tenor of the local community-oriented material carried by the stations.

The Commission's preference to WTSP-TV, Inc. was thus consistent with its disclaimer on numerous occasions of concern with or authority over the form and content of individual programs, as contrasted with a station's overall performance in terms of type and source of program material, see, e.g., *Report on Programming Policy*, 20 R.R. 1901, 1908 (1960), as well as its recognition in past decisions of a licensee's right and duty to revise its overall programming format from time to time. *KORD, Inc.*, 21 R.R. 781 (1961).⁸

2. The issues in the remand hearing.

The petitions to reopen the record filed after the Commission's decision of January, 1962 contained numerous charges and innuendoes going to the good faith of WTSP-TV, Inc.'s original presentation and the accuracy of the evidence which had been offered by WTSP-TV, Inc. at the original hearing. These allegations were all based on the fact that, early in 1960, shortly after the conclusion of the oral testimony before the Examiner, a series of modifications and changes in the program format

⁸ " . . . We fully recognize that the public interest *vis-a-vis* a programming format in a particular community is not a fixed, immutable concept." (21 R.R. 781 at 785).

of station WLCY had been introduced as a result of which a number of specific programs previously carried by the station had been discontinued or replaced by new programs or program features (R. 4846-81, 7054-7123). Adverting generally to the program changes, petitioners offered to prove on a rehearing that the owners of WLCY had "dropped their live public service programs wholesale" and had "abruptly discontinued [any] concern for the many Senior Citizens of St. Petersburg, the Churches and the public service organizations, both public and private" (R. 7056, 7060).

In light of the foregoing extreme assertions, the Commission ordered a reopening of the record for further evidentiary hearings, even though the facts on which the petitions were based had been known to petitioners for almost two years before release of its original decision (R. 5044-8). In its order remanding the case to the Hearing Examiner for further proceedings, the Commission summarized the limited basis for the remand as follows:

"Of primary significance here. . . is whether, as charged by City and Gulfcoast, the [WLCY] *pre*-change programming was a sham designed primarily to obtain a preference in this proceeding. If such is the case, questions of character qualifications, apart from normal comparative criteria, may be raised. Of course, the reasons for the change in format would be relevant to this question. Accordingly, an issue to inquire into the reasons underlying WTSP-TV's choice of programming both prior to and following its format change will be specified. . . ." (R. 5047).⁹

⁹ The full text of the remand issues was as follows (R. 5047-8):

1. "To determine the nature of the programming service rendered by Station WLCY since the close of the record herein on May 16, 1960, and the extent to which such service differs from that relied upon by WTSP-TV at the earlier hearing herein.
2. "To determine the reasons underlying (a) the choice of programming service of Station WLCY relied upon by WTSP-TV at the

(Continued, next page)

The Commission thus plainly confined the scope of the remand hearing to the sole question raised in the motions for rehearing, i.e., whether in light of the changes which had been effected at station WLCY, the original evidentiary hearing had constituted, for practical purposes, an abuse of its processes designed to mislead it concerning the true nature of the program service rendered by the station. That this was the purpose of the remand hearing was confirmed by the later opinion of the Commission's Review Board construing the remand issues (R. 5108-13) — an opinion to which none of the other applicants noted an exception in later proceedings before the Examiner and the Commission.

3. The remand evidence.

At the remand hearings WTSP-TV, Inc. offered evidence showing not only the reasons for the program changes at radio station WLCY since the period covered by its earlier testimony, but also the nature of the service rendered by that station *since the earlier hearing* (R. 5408-5633). This evidence brought the record up to date on the more recent "promise *versus* performance" of the station (R. 5416), and also established the extent of its local live and public service programming since the earlier hearing (R. 5419-5493). Finally, WTSP-TV, Inc. called as witnesses numerous representatives of area civic, governmental, religious and other organizations to testify as to the extent to which WLCY was *continuing* to provide, under its changed program format, the kind of local public service which had been a basis for the comparative

(Fn. 9, *continued*)

earlier hearing herein; and (b) the choice of programming service of that station since May 16, 1960.

3. "To determine, in light of the facts developed under the foregoing issues, (a) whether WTSP-TV, Inc. possesses the requisite character qualifications to be a licensee of the Commission, and (b) whether, and in what respects, modification of the Commission's decision in this proceeding is required."

preference originally awarded WTSP-TV, Inc. by the Examiner and the Commission (R. 5666-5819, Tr. 8689-8893).¹⁰

In his supplemental Initial Decision, the Hearing Examiner made detailed findings on the evidence concerning *both* WLCY's earlier and more recent programming. On the pivotal question of whether the program changes at WLCY in 1960 were *bona fide*, the Examiner found that the charges in the petitions to reopen the record were not borne out, but in fact were affirmatively refuted by the evidence, and his findings in this respect are not specifically challenged by Appellants.

The Examiner went on to conclude, moreover, that the operation of station WLCY *since the earlier hearings* had displayed the same commendable features which underlay the *original* comparative preference to WTSP-TV, Inc. for past broadcast performance, i.e., close adherence in performance to renewal representations to the Commission, the carrying of large amounts of live, locally-oriented public service programming, and continued attention to the publicity needs and news of area civic and community organizations and groups. Indeed, the Examiner found that in some respects the performance of the station since the original hearing had actually exceeded the operation for which WLCY was given credit originally. He summarized his conclusions as follows:

¹⁰ The following disinterested witnesses all testified at the remand hearing that the public service being rendered by station WLCY was, if anything, more extensive than at the time of the original evidentiary presentation on which the Commission's comparative preference was based: The Director of the Youth Maritime Center of the Department of Recreation of the City of Clearwater, Florida; the President of the Florida State Conference of the NAACP; the Southern Regional Director for the Aid to Leukemia-Stricken American Children (ALSAC); a retired County Commissioner of Pinellas County, Florida; the Public Relations Director of the St. Petersburg Goodwill Industries; the Tampa-St. Petersburg Marine Corps Recruiter; a Florida State Senator from the Tampa-St. Petersburg area; the Tampa Chief of Police; the President of the Tampa City Council; and an instructor in Tampa's in-school educational television program (R.5666-5819, Tr. 8689-8893).

"The ultimate findings and conclusions hereinbefore set forth under this remand hearing show (1) that WTSP-TV, Inc. is entitled to the preference as to past performance given it by the Examiner and the Commission in their final decision; (2) that the station, under its changed format, which was put into effect in May, 1960, has more than fulfilled the programming promises set forth in its renewal application filed with the Commission in 1960, except in the field of education, and that, as to the latter type of programming, its performance record in 1961 and 1962 exceeds that presented in 1957 and 1958, and further, that the station has continued to provide extensive service to the public service organizations in its entire service area, and has presented an adequate amount of local live programming. . ." (R. 6080).

In its decision adopting the Examiner's recommendation that the grant to WTSP-TV, Inc. be affirmed, the Commission stated that it had reviewed his supplemental findings of fact and conclusions in light of the exceptions thereto and adopted them, as "substantially accurate and complete," with only minor modifications (R. 6210). The Commission also noted its specific agreement with the Examiner's conclusion that "at no point did station WLCY ever abandon its obligation to the community or all of its public service programming," as charged by the other applicants (R. 6217-8).

The foregoing summary of (1) the findings on which the Commission's original comparative preference to WTSP-TV, Inc. was based, (2) the allegations leading to the remand hearings, and (3) the evidence before the Examiner and the Commission on rehearing, demonstrates the factual invalidity of Appellants' contention, crucial to their position in these appeals, that the remand hearings "wiped out" or "struck down" an essential element of the Commission's original decision. Contrary to Appellants' suggestions on brief, the Commission's original preference was based neither on the specific program format of radio station

WLCY nor on individual programs carried by the station at the time of the earlier hearing, but rather on an overall showing of fidelity in performance to renewal promises and on the carrying of a substantial amount of local live public service program material addressed to the needs of area organizations. The remand hearings amply confirmed the continuing validity of that original comparative preference.

B. *The Commission's disposition of the petitions for reconsideration was fully in accordance with its statutory obligations.*

Although Appellants' principal effort following release of the Commission's original decision in January, 1962 was to obtain a reopening of the record and a further hearing — an effort in which they were wholly successful — they also filed petitions for reconsideration of the Commission's decision, and, as noted above, the Commission deferred action on these petitions pending the remand proceedings (R. 5047). In its second decision of November, 1964, the Commission ruled specifically on the motions for reconsideration, finding in each case, for reasons stated, that they required no alteration of its original conclusion to prefer WTSP-TV, Inc. (R. 6219-6222). In so doing, it reassessed the comparative status of each of the applicants in light of the entire record before it and the arguments of the parties on reconsideration. Here, too, the Commission's action was scrupulously in accord with statutory procedure and governing decisions of this Court.

At the outset, the Commission took account of the fact that since the earlier hearing two of Bay Area's stockholders, including its President and proposed General Manager, had died (R. 9133). The Commission observed, in this connection, that its previous decision to deny the Bay Area application on a comparative basis had not been based on any adverse conclusions concerning the proposed participation of the two deceased stockholders.¹¹ In view of this fact the Commission properly

¹¹ Indeed, as Bay Area counsel had frankly conceded at oral argument, one of the two deceased stockholders had represented Bay Area's "biggest element of integration and broadcast experience" (R. 9133).

concluded that *de novo* comparative consideration of the Bay Area application was not required under this Court's opinion in *Fleming & McNutt v. FCC*, 96 App. D.C. 223, 225 F.2d 523 (1955) (R. 6219). The Commission's findings with respect to the possible effect on its original comparative decision of the death of the two Bay Area principals is clear indication that it was not disposed, after the remand hearing, to close its eyes to evidence occurring since its original decision which might have a bearing thereon, as suggested by Appellants.¹²

The Commission then went on to consider and specifically dispose of each of the four petitions for reconsideration it had held in abeyance pending conclusion of the remand hearings, making summary findings as to the contentions of each petitioner and indicating specifically its reasons for denying the petition (R. 6219-21). Especially in view of the fact that petitioners relied almost entirely on arguments which they had previously presented to the Commission in exceptions and oral argument (R. 6219), this disposition of the petitions was more than the Commission was required to do under the circumstances. Section 405 of the Communications Act requires the Commission to issue only "a concise statement of its reasons" for denying a petition for reconsideration. Clearly, the Commission was under no obligation to repeat *in extenso* the detailed findings and conclusions of its original decision, when no new matters (other than the evidence it heard in the remand hearings) had been urged as grounds for setting that decision aside.

¹² None of the other applicants alleged in their petitions for reconsideration that factual changes had occurred in regard to their own applications which would have improved their comparative position *vis-a-vis* WTSP-TV, Inc. On the contrary, probably the most significant event which had occurred in the interval between the original decision and the remand hearing was the acquisition by Gulfcoast's principal owner of the second of St. Petersburg's daily newspapers — a fact which could have only strengthened the Commission's original conclusion that the Gulfcoast application should be denied (R.4821-22).

- C. In view of the evidence on rehearing and the Commission's disposition of the petitions for reconsideration, *de novo* reevaluation of the applicants was neither necessary nor desirable.

As noted above, after concluding that the rehearing had not disclosed any basis for withdrawal of its original comparative preferences to WTSP-TV, Inc. and finding that, on a comparative basis, the petitions for reconsideration stated no grounds for reversal of its original decision, the Commission declined to undertake a complete comparative reevaluation "of this case from a *de novo* standpoint" (R. 6219-21). In view of its disposition of the motions for rehearing and petitions for reconsideration, summarized above, this determination was not only well within its permissible discretion, but eminently justified in light of all the circumstances.

As far as Appellants' hearing rights were concerned, the Commission more than discharged any obligations it may have had under §405 of the Act. Despite Appellants' inexcusable delay in coming forward with the information they later contended was of such critical importance, the Commission nevertheless held a full evidentiary hearing on their charges, in which Appellants participated at all stages. Appellants' contention now appears to be, not that they were denied any procedural rights during the remand hearing, but that the Commission erred in not embarking on the exercise of futility which would have been involved in going through a formal recomparison of the six applicants on all issues when the remand record itself, as found by both the Examiner and the Commission on the basis of evidence Appellants do not challenge, provided no basis whatsoever for reversal of its earlier determination to prefer WTSP-TV, Inc.

It is perhaps understandable that, having prevailed upon the Commission to stay its original grant to WTSP-TV, Inc. and hold further hearings, Appellants were disappointed when the remand proceedings

resulted in an administrative determination contrary to their position. However, this fact was scarcely a basis for the Commission to turn a §405 hearing into a *de novo* comparative hearing on applications which had *already* been exhaustively considered in full hearings in accordance with the provisions of § 309 of the Act.

Aside from Appellants' rights, the Commission's disposition of the remand proceedings and affirmation of its grant to WTSP-TV, Inc. also fully protected the public interest in securing the best qualified applicant for the television franchise at issue. The only substantial questions raised by anyone concerning the Commission's original comparative appraisal of WTSP-TV, Inc.'s qualifications were fully explored in the remand proceedings, on a contemporaneous record, and laid to rest. None of the other five applicants at any time asserted that changes had occurred in its own proposal since the original hearing which would have improved its position *vis-a-vis* WTSP-TV, Inc. Indeed, what changes had occurred were admittedly prejudicial to the original comparative standing of one or more of the other applicants (see, e.g., R. 9133). This is *not* a case in which the record supporting the Commission's comparative determination no longer reflected the essential facts of the winning applicant's proposals, nor in which no applicants appeared to have the requisite qualifications. Cf. *WORZ, Inc. v. FCC*, ___ App. D.C. ___, ___ F.2d ___ (Case No. 18,772, decided March 4, 1965). On the contrary, the evidence at the remand hearings showed that, in the case of WTSP-TV, Inc., the original television operating proposal on which the Commission's grant was premised (in terms of ownership, staff, operating plans, program proposals, and so forth) had remained unchanged despite the interval between the Commission's original decision in 1962 and its reaffirmation thereof two years later. In view of all these circumstances no valid public interest objective would have been served by the Commission's ordering *de novo* comparative hearings or undertaking to write a new comparative decision which would have been merely a restatement of its two earlier determinations to prefer WTSP-TV, Inc.

Moreover, there were valid public interest reasons for *not* undertaking such a *de novo* comparative reevaluation of the applicants. This proceeding, initiated in 1958 in order to bring a needed new television service to a major market, had already consumed some six years as a result of the original hearings and the remand ordered on the Commission's own motion. The Commission itself had delayed effectuation of its original decision of January, 1962, for more than two years while it considered charges arising from evidence which had been known to the complaining applicants, but not raised by them, long prior to release of the original decision. After it had determined that the rehearing showed Appellants' charges to be without foundation in fact, familiar and salutary principles of administrative finality supported the Commission's conclusion that the proceedings should be brought to an end "absent extraordinary reasons" (R. 6222) warranting still further delay.

In arguing that the Commission was required as a matter of law to undertake a *de novo* reevaluation of all applicants despite its conclusion, "based upon the entire record" (R. 6210), that neither the remand hearing nor the petitions for reconsideration had disclosed any basis for disturbing its original comparative grant to WTSP-TV, Inc., Appellants ignore both the plain language of §405 of the Communications Act and controlling judicial precedents. Section 405 commits the question of whether a rehearing should be held at all, and, if so, under what circumstances, to the discretion of the Commission, and when that discretion is invoked, the Commission has authority "to control the range of investigation in ascertaining what is to satisfy the requirements of the public interest. . .". *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 142 (1940). Contrary to Appellant's suggestions on brief, the mere filing of a motion for rehearing or reconsideration with the Commission does not vacate its original decision, and "does not reopen the case in the sense that the tribunal must reformulate the judgment." *KFAB Broadcasting Co. v. FCC*, 85 App. D.C. 160, 161, 177 F.2d 40, 41 (1949). Thus

the real issue presented by Appellants is whether, in light of its findings and conclusions in the remand hearing and its rulings on the motions for reconsideration, the Commission abused its discretion in not undertaking a *de novo* comparative reevaluation of the applicants.

Viewed against the foregoing authorities, the problem is strikingly similar to that before the Supreme Court in the leading case of *ICC v. Jersey City*, 322 U.S. 503 (1944). In that case the ICC had ordered a one-cent fare increase after a full public hearing in which appellants had participated at all stages. After release of its final decision, the carrier filed a petition for reconsideration, pursuant to §17(6) of the Interstate Commerce Act, 49 U.S.C. §17(6), raising for the first time the question of whether the newly authorized fare could be collected without requiring replacement of the carrier's existing fare collection boxes. In response to the motion for reconsideration, other parties to the proceeding asked that the record be reopened generally and a new decision issued on the merits of the original determination by the Commission authorizing the increase. The Commission thereupon reopened the record, on its own motion, and ordered a limited, *ad hoc* further hearing on the question of the practicability of collecting the new fare, but declined to reopen the case generally and bring the record "up-to-date" on all of the factors entering into its original decision.

On appeal, the Supreme Court affirmed the Commission's authority to deny rehearing of the whole case, and held that the parties had been in no way prejudiced or denied their full hearing rights by such action. The Court summarized the applicable principles as follows (322 U.S. at pp. 514-15):

"No claim is made that full hearing was denied as to the first order. The original complaint in this action, as we have pointed out, did not question the 9-cent rate order, but only the subsequent steps to modify it. The contention as to the first order is that the Commission in the circumstances was compelled to give a full re-

hearing before its order could become final. And it is urged that the order after the limited rehearing is invalid because there was a legal right to a wider range of inquiry before modification of the first order.

"This raises an important but not a new question of administrative law. The Price Administrator's contention is that this record is "stale" and that a fresh record is important. One of the grounds of resistance to administrative orders throughout federal experience with the administrative process has been the claims of private litigants to be entitled to rehearings to bring the record up-to-date and meanwhile to stall the enforcement of the administrative order. Administrative consideration of evidence — particularly where the evidence is taken by an examiner, his report submitted to the parties, and a hearing held on their exceptions to it — always creates a gap between the time the record is closed and the time the administrative decision is promulgated. This is especially true if the issues are difficult, the evidence intricate, and the consideration of the case deliberate and careful. If upon the coming down of the order litigants might demand rehearings as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening. It has been almost a rule of necessity that rehearings were not matters of right, but were pleas to discretion. And likewise it has been considered that the discretion to be invoked was that of the body making the order, and not that of a reviewing body."

The decision of the Supreme Court in the *ICC v. Jersey City* case is particularly applicable to the instant controversy, not only because of the factual similarity in the procedure followed by the Commission but also because § 405 of the Communications Act was derived, almost unchanged, from §17 of the Interstate Commerce Act. The important

considerations of administrative procedure stressed by the Supreme Court in *ICC v. Jersey City* apply with equal force to the Commission's determination here that it was not required, in view of its findings and conclusions following the remand hearing, to reevaluate the six applicants before it "from a *de novo* standpoint." That determination was clearly a question for the informed discretion of the Commission, and there is no basis in the record for finding that it abused that discretion in the circumstances of this case.

D. *The authorities relied on by Appellants do not support their position in these appeals.*

In urging that the Commission committed "fundamental procedural error" (Gulfcoast Br., p. 23) despite the fact that it held a two-year further evidentiary hearing on the only questions of substance raised in the petitions for rehearing and reconsideration, Appellants attempt to analogize this case to two different situations which have been presented in previous instances where this Court has questioned the adequacy of Commission decisions. First, they argue (Gulfcoast Br., p. 26) that the proceedings below were inconsistent with prior cases, such as *Enterprise Co. v. FCC*, 97 App. D.C. 374, 231 F.2d 708 (1955), cert. den. 351 U.S. 920 (1956), and *Butterfield Theatres, Inc. v. FCC*, 99 App. D.C. 71, 237 F.2d 552 (1956), in which this Court has remanded comparative television decisions by the Commission because of its failure to consider events occurring subsequent to its original decision and having a direct bearing on the validity of comparative preferences essential to implementation of that decision. The difficulty with Appellant's argument from these cases, of course, is that here the Commission, on its own motion, ordered precisely the kind of further evidentiary proceedings required by *Enterprise* and *Butterfield*, took extensive evidence on the allegations of the adverse parties, directed the preparation of a supplemental Initial Decision, and arrived at its ultimate conclusions

after considering not only the original record but also the remand record and the findings of the Examiner in the supplemental decision.¹³

The second line of authorities relied on by Appellants in support of their claim of "procedural" error in the remand hearings are the decisions of this Court, such as *Johnston Broadcasting Co. v. FCC*, 85 App.D.C. 40, 175 F.2d 351 (1949), to the effect that an agency must enter basic findings of fact supported by substantial evidence on all material issues, and the related doctrine of *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951), and *NLRB v. Pittsburgh Steamship Co.*, 340 U.S. 498 (1951) that an agency decision must take account of all the evidence of record. But even assuming that the decisional requirements of the foregoing cases apply to proceedings conducted by the Commission pursuant to §405 of the Communications Act — a question wholly ignored by Appellants — any contention that they were not satisfied by the Commission in this case, both at the original hearing and in the remand proceedings, borders on the frivolous.

The short answer to Appellants' argument from *Universal Camera* is the Commission's explicit statement, not shown to be incorrect by Appellants, that its decision to affirm its grant to WTSP-TV, Inc. without undertaking a *de novo* reevaluation of the applicants was "based upon the entire record" before it (R. 6210). Moreover, if there has ever been a case in which the Commission scrupulously accorded all due process rights to the applicants this surely is that proceeding. The agency's original decision was reached after approximately four years of hearings in which findings and conclusions were meticulously entered on

¹³ There are additional grounds for distinguishing this case from the *Enterprise* and *Butterfield* situations. There the events requiring the further hearings had occurred after the Commission's final decision, and related to *future* ownership and operating plans of the winning applicants. Here, on the other hand, the events in question had been known to the Appellants months before release of the Commission's decision, and related entirely to matters which had occurred earlier (i.e., the past operation of a radio station controlled by the owners of the winning applicant).

every minor and major contention of significance advanced by any of the six applicants. Thereafter, the Commission on its own motion stayed its grant and ordered still further hearings, with full participation by Appellants. Its final decision was entered only after Appellants had filed exceptions and presented oral argument on the supplemental findings of the Hearing Examiner. The Commission's second decision, like the first, contained specific rulings on each of Appellants' exceptions (R. 6224-31). See *Radio Station KFH Co. v. FCC*, 101 App. D.C. 164, 247 F.2d 570 (1957).

In final analysis, Appellants' position that they did not receive adequate comparative consideration in this case appears to be compounded in equal parts from a misreading of the Commission's second decision as holding that its original comparative preference to WTSP-TV, Inc. for past broadcast performance was being "withdrawn" (see, e.g., *Suncoast Br.*, p. 12), and on their insistence, contrary to the evidence at the remand hearing, that the program changes at radio station WLCY in 1960 had invalidated the evidentiary basis for that preference.

The fact is, as established in the discussion above, that the Commission did not "withdraw," but instead specifically affirmed, its original comparative preference to WTSP-TV, Inc., and that the evidence developed at the remand hearing supported the findings of the Examiner, adopted by the Commission, that the programming of station WLCY since the earlier hearing confirmed the continuing validity of the earlier preference. While it is true that in its second decision the Commission did not specifically rely on WLCY's "most recent performance record" as new and additional evidence of likelihood of effectuation of the WTSP-TV, Inc. proposal (R. 6222), this was clearly not prejudicial to Appellants since it had explicitly found, on the basis of the entire remand record, that nothing which had occurred since the earlier hearing vitiated its original decision in favor of WTSP-TV, Inc. or required a *de novo* comparative decision (*Ibid.*) In these circumstances, the Commission fully discharged its obligations under both §309 and §405 of the Communications Act. Cf. *Butterfield Theatres, Inc. v. FCC*, 106 App. D.C. 283, 272 F.2d 512 (1959).

- II. The contention, by Appellant Gulfcoast only, that WTSP-TV, Inc. should have been disqualified because of "misrepresentation to and *ex parte* contacts with" the Commission is also without merit.

In addition to the principal issue raised in these appeals, an argument is advanced by Appellant Gulfcoast (Gulfcoast Br., pp. 34-37) that the Commission should have disqualified or comparatively disfavored WTSP-TV, Inc., because of alleged irregularities in log-keeping at the Rahall radio stations and because one of WTSP-TV, Inc.'s directors and minority stockholders, Ogden Davies, in his separate capacity as general manager of the Rahall radio stations, had mailed to members of the Commission prior to the commencement of the television hearings a brochure summarizing the stations' public service activities.

Since, as noted above, Gulfcoast failed to appeal from the final order of the Commission in the proceedings below, a serious question is raised at the outset as to whether this Court has jurisdiction over these additional allegations. In *Southland Industries v. FCC*, 69 App. D.C. 82, 99 F.2d 117 (1938), in which it dismissed as premature an appeal by a party who had pending before the Commission a petition for reconsideration of the same decision, the Court stated as follows:

"It is a well-recognized principle that an appeal cannot be taken. . . from a judgment or decree not final as to all the parties, the whole subject matter and all the causes of action involved, ' . . . and that if the judgment or decree be not thus final and complete, the writ of error or appeal must be dismissed for want of jurisdiction'." *Southland Industries v. FCC*, *supra*, 69 App. D.C. at p. 83.¹⁴

¹⁴ The *Southland Industries* case has been followed in other instances. See, e.g., *Allentown Broadcasting Corp. v. FCC*, 94 App. D.C. 353, 355, 222 F.2d 781, 783 (footnote 1) (1954), reversed on other grounds, 349 U.S. 358 (1955); *Radio Wisconsin, Inc. v. FCC*, Case No. 13,512, unreported order of October 25, 1956. On the other hand, it is also true that this Court has on at least one occasion taken jurisdiction of an appeal where the notice of appeal was filed prior to release of the Commission's order disposing of timely petitions for reconsideration. *Wrather-Alvarez Broadcasting, Inc. v. FCC*, 101 App. (Continued, next page)

In light of the foregoing authority, and in furtherance of the general rule that this Court will not entertain appeals from administrative orders which are not final, the appeal in Case No. 19,048 should be dismissed as prematurely filed. In the event that the Court should reach a contrary conclusion as to its jurisdiction, however, the following discussion will show that the additional contentions advanced by Appellant Gulfcoast are without merit.

- A. The record fully supports the conclusions of the Examiner and the Commission that the alleged log-keeping irregularities at the Rahall radio stations did not reflect adversely on WTSP-TV, Inc.

Appellant Gulfcoast contends (Br. pp. 35-6) that the WTSP-TV, Inc. application should have been denied because of certain log-keeping and program classification questions which were the subject of extensive cross-examination during the original hearings in 1958 and 1959. The difficulty with this contention, however, is that both the Examiner and, after him, the Commission, carefully reviewed the pertinent evidence on the matter and concluded that *none* of the minor log-keeping irregularities disclosed was of sufficient importance to reflect adversely on WTSP-TV, Inc.'s qualifications. The following extracts from the Initial Decision (R. 4610-11) and the Commission's decision of January 1962 (R. 4818-19) summarize their findings and conclusions on the matter:

a. Initial Decision

"... The analyses of these various Rahall stations was the subject of much testimony during the hearing, and cross examination revealed certain errors in both log keeping and classification. A complete reanalysis of the program logs for two of the Rahall stations was

(Fn. 14, continued)

D.C. 324, 248 F.2d 646 (1957). In the latter case, however, the Appellant had filed separate notices of appeal from both the Commission's decision and its later order denying reconsideration thereof, whereas here Gulfcoast failed to note any appeal from the final order terminating the proceedings below.

made during the hearing, at the request of the opposing applicants, and revealed some areas of disagreement as to proper classification of certain programs broadcast by those stations. While such reanalysis revealed certain discrepancies, the overall programming under the various categories was not changed in any major respect. . .

"The responsible officials of the various Rahall stations admitted, upon cross examination, that in certain instances programs had been misclassified; that a program segment that was interrupted by commercial spot announcements was classified as sustaining; that a program segment in one instance was classified as sustaining although it was interrupted by a promotional spot announcement for another commercial program; that, at one of the stations, news programs were classified L/W, although it was impossible to ascertain from the logs which of the two classifications was appropriate; that only the beginning time, and not the ending time, of spot announcements are logged; that one station broadcast a foreign language program that was not monitored by any station employee, and that on one occasion such program carried 59 spot announcements in a 2-1/2 hour period; and that certain log-keeping practices might be characterized as questionable, such as, spot announcements being indicated on the pretyped log as being within a given program, but that the announcer was at liberty to scatter them where he pleased, and no notation was made as to the time the spot was actually broadcast, and that there was no way to tell whether changes were made on the logs at the time of broadcast or later. It was brought out that in the WFEA 1957 composite week analysis showing 142 NCSA's, the logs had originally shown only 62 such announcements and that an additional 80 had been added upon reanalysis of the week in order to show the number actually broadcast, and that such additions had been made by the Program Director who had been associated with the station for many years and had personal knowledge of the station's broadcasts, and were made at the direction of Farris Rahall."

b. Commission Decision

"...WTSP-TV's major principals, the Rahalls, have received considerable criticism from the other applicants herein for loose logging and commercial practices at several of their stations. The more serious allegations with respect to logging discrepancies are (1) at each of three Rahall stations (WLCY, WFEA, and WWNR), five programs were misclassified or ambiguously classified; (2) at several Rahall stations, the logs show 4 to 5 minute 'sponsored programs,' typically consisting of an opening commercial, a record, and a closing commercial, the effect of which is to remove such commercials from the category of 'spot announcements' and thus to reduce materially the number of such announcements appearing in the log; (3) the WTSP-TV analysis of non-commercial spot announcements includes, as to WFEA, 80 such announcements added to the composite week logs by the program director at the time of his analysis thereof based upon his estimate and general knowledge of the operation, and at the direction of Farris Rahall, and, as to WKAP, 76 such announcements identified in the log only as 'C/PS,' defined by the licensee as 'announced as commercial' and 'public service'; and (4) the use of pre-typed logs, and the failure of such logs to reflect the actual time that spots were broadcast or the actual length of the so-called 'sponsored segments.'

"Our study of the record evidence convinces us that none of these criticisms seriously detracts from WTSP-TV's generally good past record. Specifically, the mis-or ambiguous classification of programs appears to be due principally to the fact that some programs overlap several classification definitions, and there is no evidence of an attempt to mislead the Commission as to the true nature of the licensee's performance. The logging of commercial programs, regardless of their length and the commercial content thereof, as 'sponsored programs' and the resulting

non-applicability of the 'spot announcement' definition to commercials contained therein appears to be wholly compliant with the Commission's program classification instructions contained in Section IV, page 4, of the Broadcast Application. [footnote omitted]. It is charged that WFEA's addition of non-commercial spot announcements to the logs was with the intent to mislead the Commission. Such an intent is directly refuted by reference to the WTSP-TV exhibit in question [R. 3033] where, in its analysis of the composite week, it shows only 62 non-commercial spots and, in a footnote thereto, notes that it is the practice of its announcers to insert additional public service announcements in recorded music programs, and that approximately 80 such announcements were carried during the 1957 composite week but not entered on the logs. The failure of the logs in some instances to reflect the actual time of broadcast of spot announcements or the length of 'sponsored segments' of participating programs, and the failure to initial corrections and additions to the logs, while violative of our rules, tend to lose significance in view of similar failures on the part of competitors in this proceeding: See paragraphs 96, 100, and 102 of the Examiner's Findings of Fact [R. 4601, 4603, 4605] . . ."

Thus, despite Appellant Gulfcoast's contentions (Br., p. 36) that the Commission "whitewashed" and "ignored" the matter, the facts are that the so-called log-keeping irregularities disclosed by the record provided no basis whatsoever for findings adverse to WTSP-TV, Inc. and were, indeed, comparable to similar discrepancies in record-keeping disclosed in the case of all other applicants who chose to rely on past program logs to establish their broadcast records, *notably including Gulfcoast itself* (R. 4601.)

Gulfcoast's reliance, as authority for its allegations of error on this point, on the Commission's decisions in *Spartan Radiocasting Co.*, 21 R.R. 101 (1962) and *WWIZ, Inc.*, 2 R.R. 2d 169 (1964), does not ad-

vance its cause. Contrary to Appellant Gulfcoast's suggestion, the treatment accorded log-keeping matters in the *Spartan* case was entirely consistent with the Commission's rulings on the evidence in these proceedings, and the drastic sanctions imposed in the *WWIZ* case were for serious licensee misconduct, including willful violations of the Communications Act, in no way comparable to anything disclosed in the present record. Thus Gulfcoast is mistaken in urging that an issue is presented here of uneven treatment by the Commission of the same problem in different contexts, as was the case in *Melody Music, Inc. v. FCC*, ___ App. D.C. ___, ___ F.2d ___ (Case No. 18,857, decided April 8, 1965).

B. *The Examiner and the Commission properly held that the charges of "ex parte" conduct by WTSP-TV, Inc. were without decisional significance.*

Gulfcoast's brief (p. 34) also resurrects its unsuccessful attempt at the hearings below to impute sinister motives into what the record shows was an entirely innocent action by Ogden Davies, one of WTSP-TV, Inc.'s directors and minority stockholders, who was also at the time general manager of the Rahall radio stations. The incident relied on by Gulfcoast to show what it characterizes as improper "ex parte" contacts by WTSP-TV, Inc. with the Commission occurred early in 1958, several months before the WTSP-TV, Inc. television application was even designated for hearing. The facts of the matter were fully explored at the hearing at the instance of the other parties (Tr. 3038-42, 3059-65, 3071-75), and were summarized in the Initial Decision by the Hearing Examiner as follows (R. 4609):

"... At present the Rahall brothers are principal stockholders in four radio stations, and at the time of the hearing were controlling stockholders in a fifth station. Type and source analyses of the programming carried by these five stations were submitted at the hearing, and, in addition thereto, a document entitled "Selected

and Outstanding Public Service Accomplishments for the Year 1957 by the Rahall Stations" was presented. The last mentioned document was prepared by the individual station managers at the request of Mr. Davies as General Manager of the Management Team, and resulted from a suggestion at the 1956 convention of the National Association of Broadcasters that stations keep records of their public service activities so that the Commission could be informed of their activities in this respect. In January 1958 copies of this document were distributed to the national representatives of the stations, to members of the Commission, to the individual managers of the stations, and to the applicant's Washington counsel."

The Commission concluded in its decision of January 1962, that no adverse significance could be attributed to the fact that the booklet describing the public service programming of the various Rahall radio stations had been distributed to members of the Commission, among others, prior to the institution of the television proceedings, especially in view of the fact that the identical material was later offered at the television hearing by WTSP-TV, Inc. in exhibit form, served on all other parties to the case, and was in fact subject to extensive cross-examination by the other applicants (R. 2742-3022). The question was again considered by the Commission in its second decision of November 6, 1964 in response to Gulfcoast's petition for reconsideration (R. 6219) and again the Commission affirmed its earlier ruling that submission of the material to the Commission by the Rahall radio officers was, at most, "no more than a case of over-zealous public relations activity" (R. 4825).

This ruling was clearly correct. As general manager of the Rahall radio stations Mr. Davies had every right to file directly with the Commission or its members data reflecting their public service activities as licensees. Indeed, it is a common practice in the broadcast industry for station managers to do so. And any inference that this action was

intended as an *ex parte* presentation in support of the WTSP-TV, Inc. television application (not yet even designated for hearing at the time) is conclusively rebutted by the fact that WTSP-TV, Inc. itself later included the same material in its hearing exhibits and thereby subjected it to full and searching cross-examination by the other applicants. Appellant Gulfcoast's attempt to bring the matter within the entirely inapposite ambit of such cases as *WKAT, Inc. v. FCC*, 111 App. D.C. 253, 296 F.2d 375 (1961), cert. den., 368 U.S. 841 (1961), and *Massachusetts Bay Telecasters, Inc. v. FCC*, 111 App. D.C. 144, 295 F.2d 313 (1961), is wholly unconvincing.

In summary, even if the Court should conclude that it has jurisdiction over the Gulfcoast appeal, neither of the additional grounds advanced by Gulfcoast for disqualification or comparative denial of the WTSP-TV, Inc. application has even superficial merit. Both arguments relate to matters as to which the evidence is not in dispute; which were carefully considered by the Hearing Examiner and the Commission; and as to which the decisions below contain findings and conclusions amply supported by the record. In such circumstances, there is simply no basis for interference with the Commission's decision by this Court. See *Community Telecasting Corporation v. FCC*, 115 App. D.C. 181, 317 F.2d 592 (1963).

III. Gulfcoast's belated attack on the Commission's comparative criteria is not properly before the Court, and in any event states no basis for remand of these proceedings.

The only remaining argument advanced in these appeals is the extended attack by Appellant Gulfcoast (Br., pp. 8-22) on the comparative criteria which have been evolved over the years by the Commission as guidelines in resolving conflicting applications for new broadcast facili-

ties. Gulfcoast contends, for the first time, that the Commission's comparative television licensing standards are inherently capricious and, hence, cannot support a final choice among otherwise qualified applicants. On this basis, Gulfcoast would have the Court remand this case to the Commission, presumably for a new decision employing some other criteria than those which it normally applies to mutually exclusive applications.

Even if Gulfcoast's quarrel with the Commission's decisional processes had merit, which it does not, its argument comes too late for consideration in this appeal. As already noted, Gulfcoast made no challenge to the order designating its application for hearing under the standard comparative issue at the outset of this case in 1958, and vigorously contended throughout the long course of the proceedings below that its application should be preferred *under the very comparative criteria it now brands as arbitrary*. Indeed, Gulfcoast so argued as recently as April 1964, in its oral presentation to the Commission *en banc* opposing the Examiner's Supplemental Initial Decision (R. 9142-44). Finally, Gulfcoast did not raise in its notice of appeal in this Court the novel contention it now attempts to make.

It is, of course, axiomatic that this Court will not consider allegations of error not presented to the Commission in the first instance. *A fortiori*, grounds for reversal of agency action cannot be considered where they were not preserved in the notice of appeal. The sound reasons underlying these established rules of appellate review have been too often discussed by this Court to require further emphasis. See e.g., *O'Neill Broadcasting Co. v. FCC*, 100 App. D.C. 38, 241 F.2d 443 (1956); *Democrat Printing Co. v. FCC*, 91 App. D.C. 72, 202 F.2d 298 (1952). Under the familiar principles enunciated in the foregoing cases, Gulfcoast's afterthought argument that the Commission's comparative criteria are *per se* invalid should be disregarded by the Court.

In any event, it is equally clear that, if the Court were to consider Gulfcoast's broad-gauge assault on the now familiar criteria used by the Commission in comparative television cases, this argument would have to be rejected on its merits as plainly foreclosed by a long line of decisions of this Court. Thus, in *Pinellas Broadcasting Co. v. FCC*, 97 App. D.C. 236, 230 F.2d 204 (1956), cert. den., 350 U.S. 1007 (1956), Circuit Judge Prettyman, speaking for the Court, observed as follows:

"The controversy is in an area into which the courts are seldom justified in intruding. The selection of an awardee from among several qualified applicants is basically a matter of judgment, often difficult and delicate, entrusted by the Congress to the administrative agency. The decisive factors in comparable selections may well vary; sometimes one applicant is superior to another in one respect, whereas in another case one applicant may be superior to its rivals in another feature. And it is also true that the Commission's view of what is best in the public interest may change from time to time. Commissions themselves change, underlying philosophies differ, and experience often dictates changes. Two diametrically opposite schools of thought in respect to the public welfare may both be rational; e.g., both free trade and protective tariff are rational positions. All such matters are for the Congress and the executive and their agencies. They are political, in the high sense of that abused term. They are not for the judiciary" (97 App. D.C. at p. 238.)

The Court's opinion in the *Pinellas* case (in which the majority owner of Gulfcoast Broadcasters, Inc. was also the controlling stockholder of the Appellant, Pinellas Broadcasting Co.), has been repeatedly followed in other decisions by this Court reviewing Commission resolution of comparative television cases. See, e.g., *McClatchy Broadcasting Co. v. FCC*, 99 App. D.C. 195, 239 F.2d 15 (1956), cert. den., 353 U.S. 918 (1957); *Tampa Times Co. v. FCC*, 97 App. D.C. 256, 230 F.2d 224

(1956); *Sacramento Broadcasters, Inc. v. FCC*, 98 App. D.C. 394, 236 F.2d 689 (1956); *Community Telecasting Corporation v. FCC*, 115 App. D.C. 181, 317 F.2d 592 (1963).

Moreover, nothing in the arguments advanced by Gulfcoast would indicate a basis for a contrary conclusion here even if the question had not been foreclosed by earlier decisions of this Court. Essentially, Gulfcoast rests its case for invalidation of the Commission's comparative television licensing criteria on a statistical tabulation — the accuracy of which Intervenor by no means concedes — of program data from renewal applications filed by stations preferred in comparative television cases during the last ten years. Even Gulfcoast eschews (Br., p. 21) any claim that this material "represents the comprehensive type of survey, study, investigation, and research that is necessary to establish valid comparative criteria." Gulfcoast also acknowledges that "only the Commission has the data, resources, personnel and investigating power to make such a study and evaluation" (*Ibid.*). At most, the information attached to the Gulfcoast brief (assuming, *arguendo*, its accuracy) shows only that, for reasons not disclosed therein, most television stations licensed after comparative hearings have found it necessary or desirable to operate with different percentage analyses of individual programming than those contained in their original applications. Even if this has been the case, however, the conclusion by no means follows that the particular stations involved (which include some of the outstanding television stations in the country) should not have been licensed in the first place in preference to other applicants whose proposals were found inferior by the Commission.

Finally, it seems clear that even if the Gulfcoast argument had merit as an abstract proposition, this Court is not the appropriate body to attempt a revision of the Commission's licensing criteria; nor do these criteria, even if they are in need of improvement, in and of themselves provide a basis for reversal of comparative television decisions

in which, as in this case, the Commission has scrupulously adhered to all procedural requirements, and has assigned understandable reasons, supported in the evidence before it, for the result reached.

CONCLUSION

For the foregoing reasons, the appeal in Case No. 19,048 should be dismissed, and the orders appealed from in Case Nos. 19,172 and 19,175 should be affirmed.

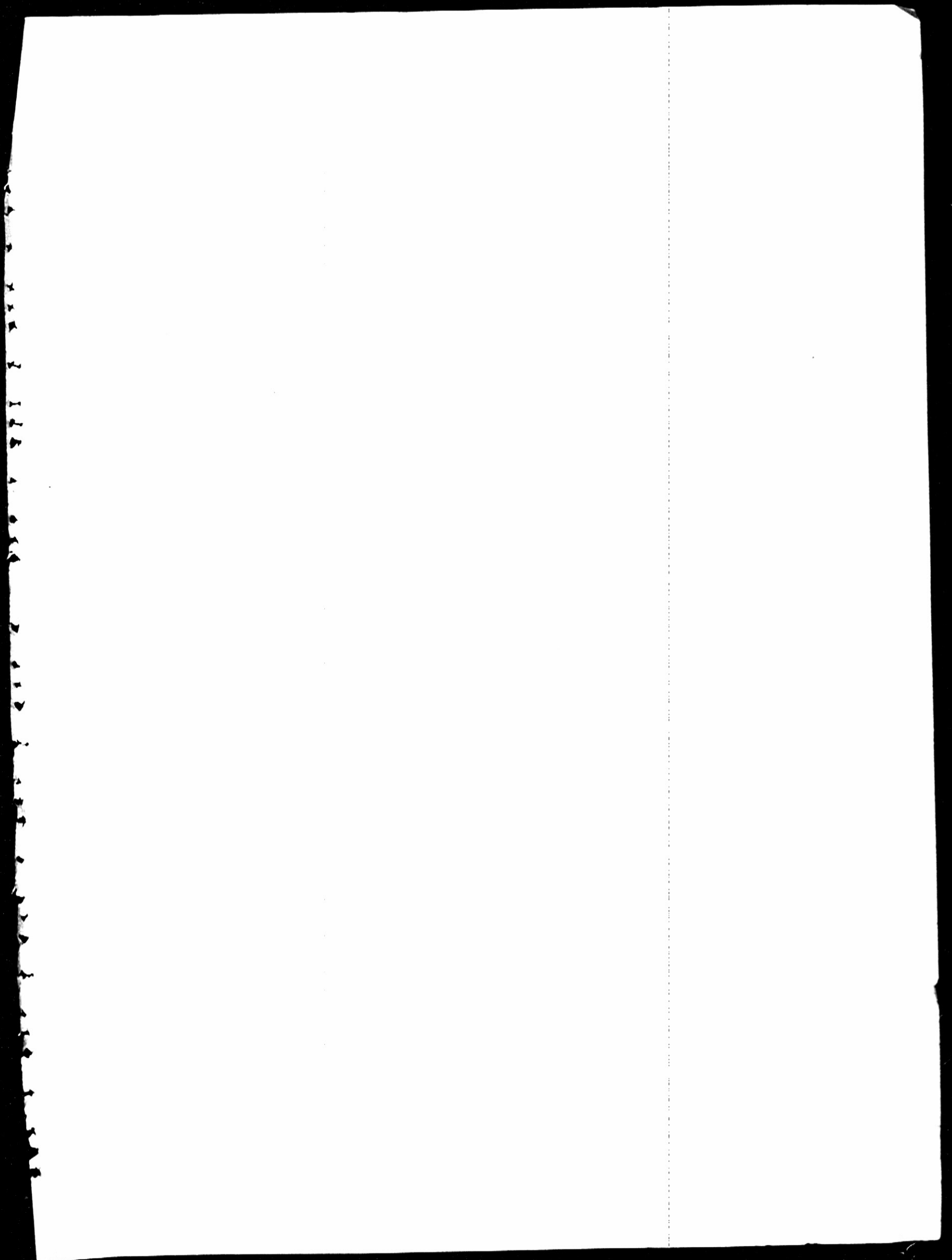
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June 11, 1965



REPLY BRIEF FOR
FLORIDA GULF COAST BROADCASTERS, INC.,
APPELLANT IN CASE No. 19048

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,048

FLORIDA GULF COAST BROADCASTERS, INC.,
Appellant
v.
FEDERAL COMMUNICATIONS COMMISSION,
Appellee
WTSP-TV, INC.,
Intervenor

No. 19,172

SUNCOAST CITIES BROADCASTING CORP.,
Appellant
v.
FEDERAL COMMUNICATIONS COMMISSION,
Appellee
WTSP-TV, INC.,
Intervenor

No. 19,175

TAMPA TELECASTERS, INC.,
Appellant
v.
FEDERAL COMMUNICATIONS COMMISSION,
Appellee
WTSP-TV, INC.,
Intervenor

*Appeals From Decisions and Orders of the
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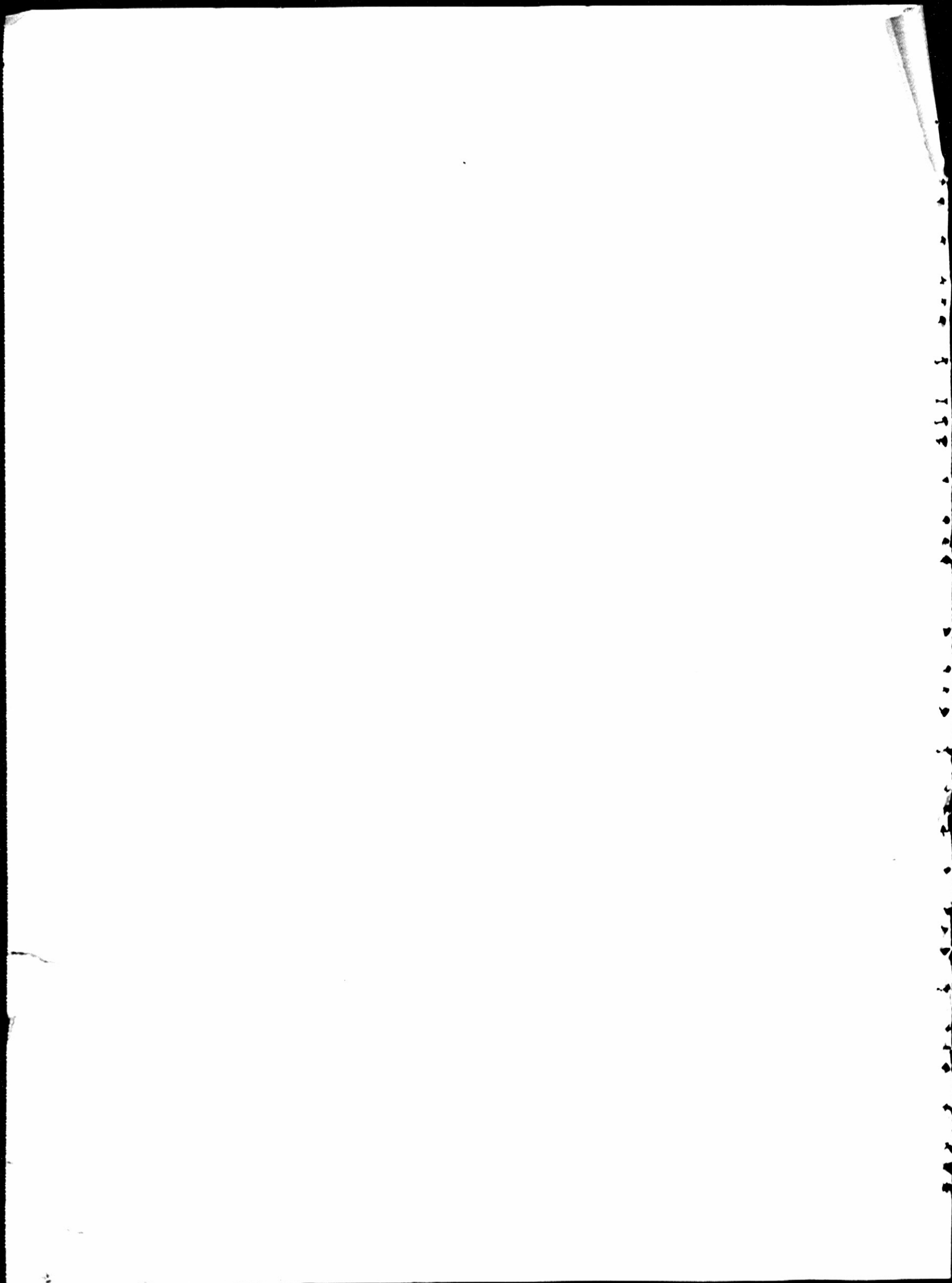


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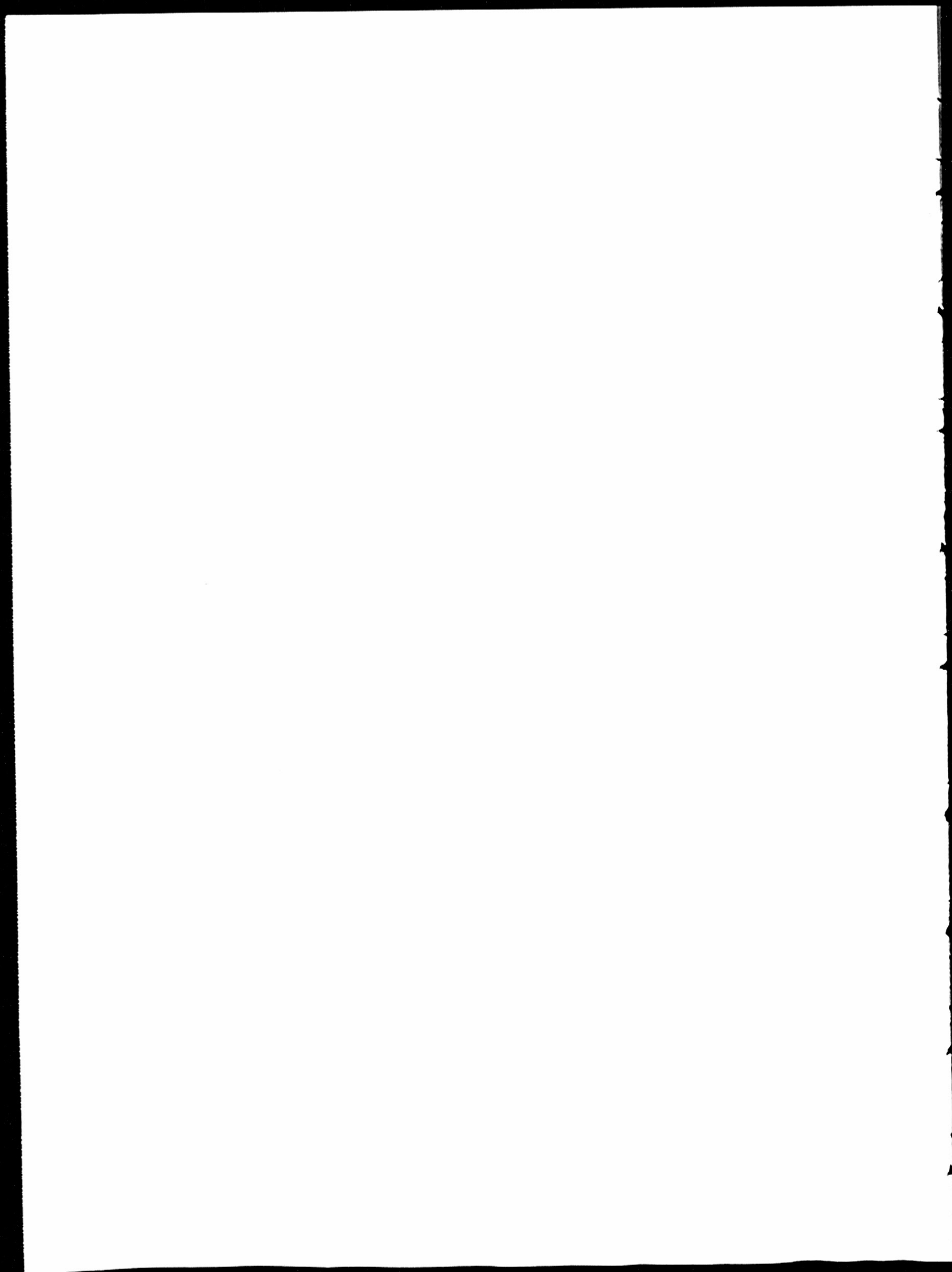
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REPLY BRIEF FOR
FLORIDA GULF COAST BROADCASTERS, INC.,
APPELLANT IN CASE No. 19048



INTRODUCTION

Appellant, Gulfcoast, in its opening brief, urged the Court to reverse and remand the Commission's Decision on three principal grounds. They are:

1. The use by the Commission of arbitrary and capricious criteria;
2. Failure of the Commission on reconsideration to consider the entire record on a comparative basis;
3. Failure of the Commission to find Intervenor absolutely disqualified.

The Commission and Intervenor contest all three points. No further argument is required with respect to the third issue. Brief replies are warranted with respect to the first two issues.

I

COMPARATIVE CRITERIA

In its opening brief Gulfcoast pointed out that the system of comparative criteria utilized by the Commission in deciding broadcast cases is based upon a system of Commission-created presumptions that certain qualities of an applicant give assurance that the applicant will carry out its commitments as to operation of its station. Thus, for example, the Commission favors local ownership as against absentee ownership not because of any quasi-homesteading substantive policy, but because, as the Commission views it, there is presumptively more assurance that local owners will carry out their representations than will absentee owners. The same reasoning is followed with respect to the criteria of integration of ownership and management, broadcast experience, civic participation, etc. These presumptions are not ranked as to priority, and, accordingly, the Commission decision-writers have complete freedom to pick and choose the particular presumption to exalt or downgrade in order to justify the choice of a particular winning applicant previously selected by the vote of non

opinion-writing Commissioners. The presumptions, moreover, were conceived on an *a priori* basis, and no effort has ever been made by the Commission to test by experience whether there is any factual basis for the presumptions. On the contrary, Gulfcoast showed by an examination of data officially on file with the Commission, that there is almost a zero correlation between the performance achieved by the applicant selected by the Commission in television comparative cases on the basis of the above presumptions and the promises they made in the comparative hearing. Gulfcoast does not mean by the study to imply that any winning applicant performed poorer than would a losing applicant, had one of the latter been chosen. The purport of the study was to show that all of the empirical data revealed that there was no basis in fact or experience for the presumptions relied upon by the Commission. Reliance upon presumptions which have no validity in fact or experience is arbitrary and capricious.

The Commission and the Intervenor in their briefs make two arguments against the Gulfcoast position. First, they urge that the Court is without power to consider the Gulfcoast contention since the matter was not urged before the Commission. Secondly, they attempt to justify the comparative criteria on the merits. Each point will be considered in turn.

A.

The Validity or Invalidity of Comparative Criteria May Properly Be Considered by the Court

The Commission (Brief 32-35) and Intervenor (Br. 36-37) argue that Gulfcoast's attack on the Commission's comparative criteria is not properly before this Court because the matter was not raised before the Commission. They cite Section 405 of the Communications Act and decisions requiring exhaustion of administrative remedies. Gulfcoast does not deny that, as a general rule, appellants may not for

the first time raise matters before the reviewing court which were not presented to the administrative agency. However, this is not an absolute rule. The courts have held that they can and will consider arguments not urged before the administrative agency where such action is necessary to promote justice, or is necessary to consider matters which affect the public interest, or where the action is necessary to require the agency to discharge its proper functions under the law. *Hormel v. Helvering*, 312 U.S. 552 (1941); *Pinellas Broadcasting Co. v. FCC*, 97 U.S. App. D.C. 236, 230 F.2d 204, *cert. den.*, 350 U.S. 1007 (1956); *U.S. ex rel. Johnson v. Shaughnessy*, 336 U.S. 806 (1949); *Ward v. Anderson*, 93 U.S. App. D.C. 156, 208 F.2d 48 (1953), *sub nom. Thomas v. Ward*, 96 U.S. App. D.C. 302, 225 F.2d 953 (1955), *cert. den.*, 350 U.S. 958 (1956); *Colorado Interstate Gas Co. v. Federal Power Commission*, 209 F.2d 717 (C.A. 10, 1953), *affirmed on rehearing*, 209 F.2d 732 (1954).

Gulfcoast urges that the interests of justice and the requirements that the Commission carry out the mandate of the Communications Act justify the Court in considering Gulfcoast's argument as to the invalidity of the Commission's comparative criteria. The Commission is required to grant only those applications which will serve the public interest, convenience and necessity. When several qualified applicants request the same channel, the Commission is required to select the best qualified applicant, the one who will best serve public interest, convenience and necessity. The choice must be a rational one and must be related to objectives which the Commission is authorized to promote. The showing made by Gulfcoast in its opening brief revealed that the Commission's criteria have no such basis. The criteria are so vague and shifting that they can be utilized to justify almost any result that the Commission feels disposed to reach. Moreover, although the criteria are supposedly designed to enable the Commission to choose the applicant most likely to carry out its representations, the study reveals that there is no basis in fact or in experience for the

presumptions thus created. The net effect of the system has been a profusion of over-lengthy records and a choosing of winners that betrays caprice and unfounded judgments—judgments that have no basis in logic or experience, and which do not command respect from the public or from disinterested observers who have studied and analyzed Commission decisions.

Moreover, it should be pointed out that there was a basis for Gulfcoast not raising the matter initially before the Commission. It is true as argued by the Commission (Brief, 33) that Gulfcoast did urge the Commission to prefer it on the basis of the comparative criteria enunciated by the Commission.

These were the only criteria then in existence, and Gulfcoast did not have in its possession any objective data as to the basic invalidity of these criteria. Gulfcoast may have had nagging suspicions on this score, but it had no proof. The suspicions became strengthened when the Commission released its decision on rehearing, a decision which all too patently was designed to defend a grant previously made rather than to evaluate all of the evidence to ascertain which applicant could best serve public interest, convenience and necessity. Final realization came as a result of Commission action subsequent to the filing of this appeal. Reference has been made in our opening brief (p. 16) to the concurring opinion of Commissioner Loevinger in *Veterans Broadcasting Co., Inc.*, 4 RR 2d 375, 440 (1965), where he graphically exposes the "unsatisfactory and inadequate character of the procedures and criteria employed by the Commission for the determination of multi-party comparative proceedings". Commissioner Loevinger, himself, characterizes these procedures as making "the final result very nearly a matter of chance." This opinion was released after Gulfcoast filed its Notice of Appeal in this case, but before it filed its brief. While, prior to that date, Gulfcoast may have had doubts about the Commission's criteria, it was Commissioner Loevinger's opinion

which revealed in a formal manner proof of what Gulfcoast suspected. As a member of the Commission, Commissioner Loevinger knows the inside story of the Commission's deliberation and decision-making process. His words, therefore, carry authority. The Gulfcoast study supplied statistical and empirical data underscoring the weakness of the Commission's criteria as theretofore revealed by Commissioner Loevinger.

Gulfcoast believes that the Court can and should consider the attack on comparative criteria raised in its brief. We believe that we have shown there was a reasonable basis for Gulfcoast not raising the matter before the Commission. Moreover, the points raised are substantial and reveal that considerations of justice as well as the requirements compelling the Commission to abide by the requirements of the Communications Act, warrant the Court in considering the point on the merits.

B.

The Commission's Comparative Criteria Cannot Properly Be Used as a Basis for Deciding the Instant Case

Only the weakest defense of the comparative criteria is attempted by either the Commission or Intervenor. Although Gulfcoast carefully documented the official sources upon which it based its study, neither the Commission nor Intervenor attempts to contradict any part of the study or to show any inaccuracy therein. The Commission (Brief 35-36) attempts to justify the poor performance of the winning applicants as against promises by pointing to a number of excuses which might be available to the winning applicant for not carrying out their commitments. The Commission misses the point. Gulfcoast does not, by its study, seek to have the Commission compare promise and performance in order to see if licenses should be renewed. Gulfcoast does not know whether there are or are not good reasons for winning applicants

failing to carry out their promises. The purpose of the study was simply to demonstrate that there was no basis in fact or experience for the criteria relied upon by the Commission as presumptively giving assurance that certain applicants can be relied upon to carry out their representations. Where the study shows almost a zero correlation as between promise and performance—no matter which presumption happens to be the chosen vehicle for making a grant in a given case—the conclusion is inescapable that the criteria have no foundation or basis. The Commission might just as well announce as a criterion that applicants with blue eyes are more likely to carry out their representations than applicants with brown eyes. Everyone would agree that such a criterion would be arbitrary and capricious even as an *a priori* matter. But history and experience have shown that the presumptions relied upon by the Commission have no correlation between fact and promise. Whatever difference there might be as an *a priori* matter between the ridiculous criterion set forth above and the criteria chosen by the Commission, the fact remains that on the basis of fact and experience there is no more correlation between promise and performance in the case of the Commission's criteria than there would be in the case of the ridiculous criterion of eye color as a basis for decision. No matter how much basis in *a priori* logic there may have been originally for selecting the presumptions relied upon by the Commission, it should not be permitted to rely on these presumptions when all operating experience has shown them to be without foundation and when one of the Commission's own members has been frank enough to admit that they result in decisions that are "very nearly a matter of chance."

II.

FAILURE TO CONSIDER THE ENTIRE RECORD

In the Commission's original decision, Intervenor was awarded a decisive preference by virtue of the manner in which it had programmed its AM station WLCY. Of particular noteworthiness according to the Commission was WLCY's broadcast of 22.7% of local live programming during the composite week (Record 4820). Following this decision, petitions to reopen the record were filed based upon changes in WLCY programming initiated after the close of the record. The Commission was of the opinion that these petitions were not timely filed and accordingly denied the petitions. Nevertheless, the Commission felt constrained to reopen the record on its motion since:

" . . . the matters presented in the . . . petitions raised sufficient doubt as to the validity of some conclusions upon which our award to WTSP-TV rested . . ." (R. 5046).

A lengthy further hearing followed. The Commission limited this second final decision to a consideration as to whether the evidence in the further hearing required a disqualification of Intervenor. Having concluded that the evidence did not warrant such action, the Commission then proceeded to take up the petitions for reconsideration directed at the original Commission Decision (ruling as to which had been deferred pending completion of the remanded hearing) and disposed of these petitions upon the basis of the evidence adduced at the original hearing.

There is no basic dispute in the record that the Commission treated the hearing records as though they were two separate hear-

ings; in effect, two water-tight compartments.¹ The Commission and Intervenor justify the Commission's action on the ground that petitions for rehearing are addressed to the discretion of the Commission in accordance with the provisions of Section 405 of the Communications Act. They argue that in view of the length of the proceedings and the lateness of the petitions calling the Commission's attention to the new evidence—there was no abuse of discretion by the Commission in not undertaking a comparative evaluation on the basis of the entire record.²

Gulfcoast does not dispute the fact that the Commission has a certain amount of discretion in determining whether to grant a petition for rehearing. The cases cited by the Commission (Brief 18, 24) and In-

¹ Intervenor in its brief seems to have some difficulty in making up its mind as to whether the Commission did or did not re-evaluate Intervenor's performance on the basis of the entire record (compare Intervenor's Brief pages 19, 27 with 21-26). The Commission's brief betrays no such vacillation. It candidly admits that the evidence taken at the reopened hearing did not enter into a comparison of the applicants; this comparison was made only on the basis of the evidence taken in the original hearing. (See Commission's Brief, pages 25-29.)

² Intervenor (Br. 24) also relies on *ICC v. Jersey City*, 322 U.S. 503 (1944). Its reliance upon that case is misplaced. That is a rather involved and complex case involving several steps of rate making. It should be pointed out that under the Administrative Procedure Act, rate-making cases are assimilated to rule-making proceedings rather than to adjudicatory cases. In any event, in the *Jersey City* case, the Supreme Court held that the I.C.C. had a great deal of discretion in determining whether the so-called staleness of the record required a reopening of the record. Gulfcoast does not challenge the general rule that an administrative agency possesses a great deal of discretion in deciding whether a record is so stale that a new hearing must be held. The I.C.C. solved the problem of staleness in the *Jersey City* case by taking a second step in a rate-making process without retracing all previous ones. That action is comparable to the Commission's decision in this case to reopen the record only with respect to Intervenor and not permitting the other applicants to update their applications and to make a new comparative showing. However, neither *Jersey City* nor any other case stands for the proposition that once a record is reopened the evidence taken in the reopened proceeding can be considered all by itself for one purpose and wholly ignored for another purpose.

tervenor (Brief 9-10) all go to the question of the Commission's authority to refuse to reopen hearings. We have an entirely different situation here. Whether or not the Commission was correct in denying the petitions to reopen the record, the fact remains that the Commission did reopen the record—cognizant of its affirmative duty to fully explore all relevant facts bearing upon the public interest. Cf. *Clarksburg Publishing Co. v. FCC*, 96 U.S. App. D.C. 211, 225 F.2d 511 (1955). Once the record was reopened, the Commission was required to weigh all of the facts and factors obtaining as of the date of its final action in the case. What was decided earlier may have historical interest. However, for decisional purposes all of the facts in the record must be considered as a whole without any distinction as to the date when these facts first entered the record. Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Sec. 1006(c); *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134 (1940); *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951); *Enterprise Co. v. FCC*, 97 U.S. App. D.C. 374, 231 F.2d 708 (1955), *cert. den. sub nom. Beaumont Broadcasting Corp. v. Enterprise Co., et al.*, 351 U.S. 920 (1956); *W. S. Butterfield Theatres, Inc. v. FCC*, 99 U.S. App. D.C. 71, 237 F.2d 552 (1956).

The Commission (Brief 29-30) and Intervenor (Br. 26-28) attempt to distinguish *Enterprise* and *Butterfield* on two grounds. First, they urge that in the instant case, unlike the cited cases, the Commission in fact ordered a remand and conducted a further hearing. However, this merely goes half the distance required by this Court. This Court in the cited cases made it clear that not only must the Commission reopen the record, but on such reopened hearing, the Commission cannot limit its consideration of the new evidence to the issue whether the new evidence warranted a revocation of permit or a finding of lack of qualification on the part of the winning applicant. This Court made it clear that the applicants are to be compared upon the basis of the evidence in the entire record, irrespective of the date when the evidence

was taken. Thus, in *Enterprise*, the Court made it clear that the Commission would not be warranted in limiting consideration of the new evidence to the question of whether the winning applicant was disqualified. On the crucial question of diversification, the Commission was required to compare the applicants on the basis of the evidence in the original record and in the new record. The same result was required in *Butterfield*.

The second attempted distinction is that in *Enterprise* and *Butterfield*, the changes which took place went to composition of the applicant and proposed programming, whereas in the instant case the changes occurred with respect to the programming of the AM station. This is a distinction without a difference. The relevance of the programming of the AM station is that the Commission relied upon the programming of the AM station as indicating a decisive preference for Intervenor. As is pointed out in our opening brief, the new evidence shows a major change in overall programming and a substantial decline in local live programming—facts which were strongly relied upon by the Commission for preferring Intervenor. The fact remains that in the instant case no less than in *Enterprise* and *Butterfield*, we have a situation where the new evidence has a substantial bearing with respect to an established criterion relied upon by the Commission for choosing one applicant over the other applicants on a comparative basis. Why the Commission and Intervenor believe that changes with respect to such criteria as composition of the applicant or proposed programming require a comparative evaluation upon the basis of the entire record, while no such comparative evaluation is required when the criterion involved is past broadcast record, is not explained in the briefs. The answer is simple. There is no basis for such distinction.

On final analysis, the arguments of both the Commission and Intervenor come down to that old standby "administrative finality." (See Commission Brief, 31-33; Intervenor Brief, 21-24.) This is the same

time-worn excuse brought forth by the Commission in *Enterprise* and *Butterfield* and found wanting by the Court in those cases. There is even less basis for the argument here. In *Butterfield* and *Enterprise*, the Commission by its action could have achieved a certain amount of administrative finality (if the Court had upheld its action) by refusing to reopen the record. Had the Court sustained the Commission's action, the matter would have been at an end. In the instant case, if the Commission were serious about its "administrative finality" argument, it would have not only denied the petitions for reopening the record, but would have refused to reopen the record on its own motion. That would have meant "administrative finality" if the Court agreed that no abuse of discretion was involved. That did not happen. The Commission obviously did not feel that it was warranted in refusing to reopen the record. The fact remains that it did reopen the record and did so on its own motion in recognition of its obligation to have a complete record on matters affecting the validity of its conclusions upon which the original award to WTSP-TV rested. Thereafter, all of the steps involved in a hearing were taken. Evidence was introduced, witnesses were cross-examined, the parties were given an opportunity to submit proposed findings and the examiner rendered an initial decision. Almost 14 months elapsed from the time that the Commission ordered the record to be reopened to the date upon which the examiner released his initial decision. There is no warrant for finding that this period would have been appreciably longer, if any longer, if the issues under which the case were tried required the examiner to recompare WTSP on the basis of the evidence adduced at the new hearing as well as the evidence adduced at the old hearing. After the release of the Initial Decision, exceptions were filed, oral argument was held before the Commission *en banc* and a final decision was released by the Commission. Almost 14 months elapsed from the date on which the examiner released his initial decision to the date upon which the Commission issued its final decision. Again there is no warrant for asserting

that any appreciably longer period of time—indeed *any* greater period of time—would have been required for the Commission to write a decision comparing the applicants on the basis of the entire record and not simply upon the basis of two separate proceedings. The Commission and the parties invested more than 28 months from the date of the reopening of the record to the date of the final decision by the Commission. If the Commission felt that the issues were important enough to warrant a proceeding that took more than two years' further hearing, it is difficult to see how it can now argue that considerations of administrative finality require it to adopt the hybrid type of procedure it followed in this case.

Respectfully submitted,

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July 28, 1965

REPLY BRIEF FOR APPELLANT IN NO. 19,175

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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FLORIDA GULFCOAST BROADCASTERS, INC., Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION, Appellee,
WTSP-TV., INC., Intervenor.

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SUNCOAST CITIES BROADCASTING CORP., Appellant,

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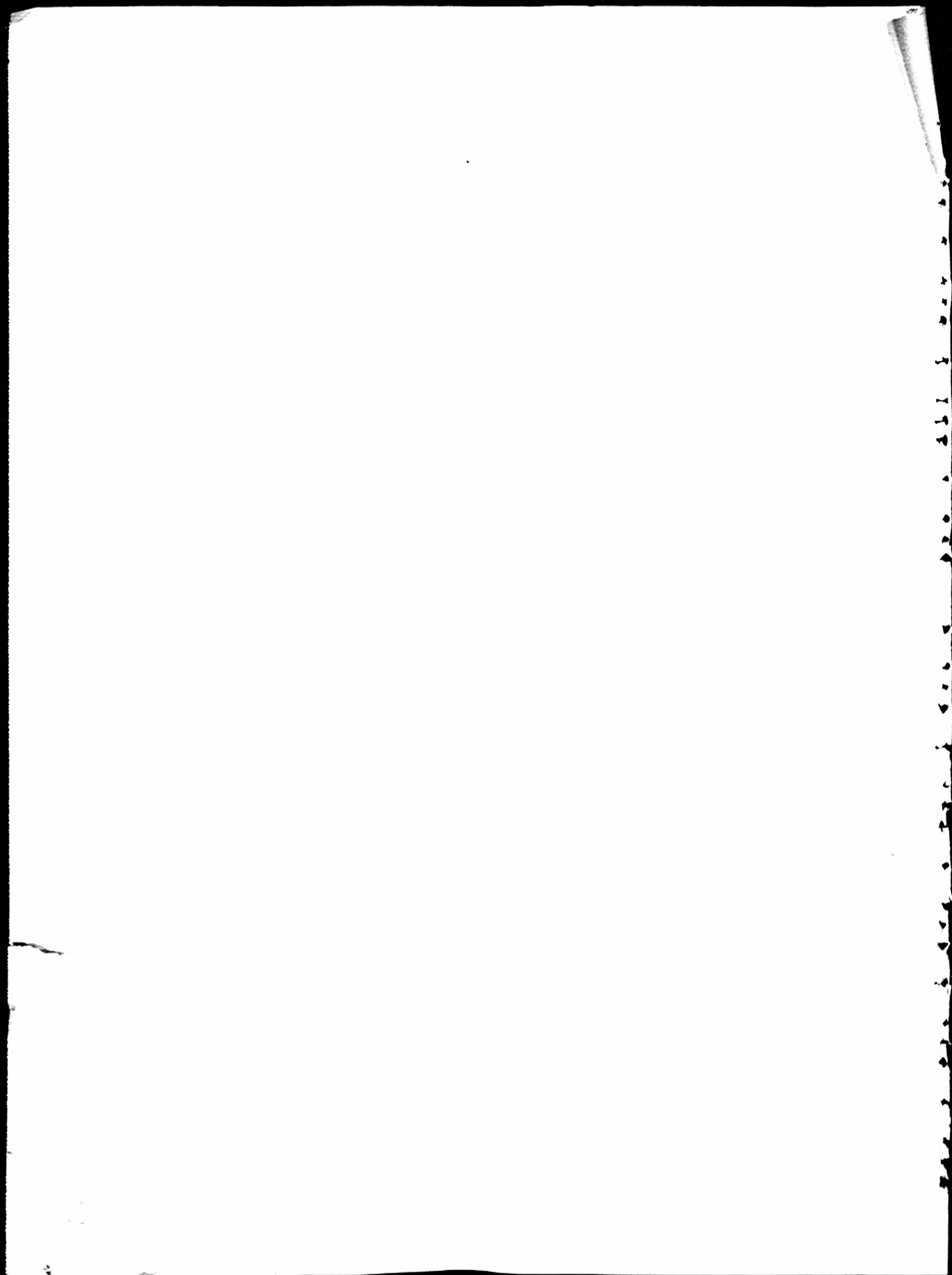
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REPLY BRIEF FOR APPELLANT IN NO. 19,175

**Appellee's and Intervenor's Contentions Are
Based on a Misstatement of the Nature
of the Commission's Second Decision**

During the conduct of the television hearing WTSP-TV, Inc., relied extensively on the programming which its principals, the Rahall Brothers, had been broadcasting over their St. Petersburg station, WTSP, now WLCY. The Examiner and the Commission accorded WTSP-TV, Inc., "a significant preference" for such past performance. The hearing on remand showed that shortly after the conclusion of the first evidentiary hearing the Rahall's began to abandon, and eventually completely abandoned, the mode of operation and most of the programs of which they had been so proud at the first hearing. The Commission concluded that the sequence of events had occurred in good faith, i.e., that the programming relied upon at the original hearing by the Rahall's had been broadcast by them because they believed the programming would serve the public interest rather than because they believed the programming would gain them a preference in the television hearing. Without further consideration of the remand record, the Commission affirmed the grant to the Rahalls on the basis of the original record, reinstating the significant preference for past broadcast performance.

The Appellee and Intervenor do not agree with the last sentence. Rather, each of them contends that the Commission did consider the new programming on WLCY and concluded that although it was different from the programming for which the significant past broadcast preference was given, it likewise showed attention to the public need and therefore, provided no basis for a withdrawal of the significant preference. The difficulty with the argument is that the Commission plainly stated that it did not do what Appellee and Intervenor claim it did.

The following language from the Commission's second Decision is clear and explicit:

Pursuant to the remand issues, the Examiner made detailed findings in regard to WLCY's past broadcast record in 1957 and 1958. These findings reflect the record evidence which we relied upon in concluding in our prior decision that WLCY was most responsive to the needs of St. Petersburg. *For the purposes of clarification, we point out that we do not rely on WLCY's most recent performance record as evidence of likelihood of effectuation. Rather, we are affirming our prior decision based upon the facts elicited at the original hearing* because, as shown in detail by paragraphs 6 to 28, *supra*, subsequent changes in WLCY's programming do not establish that the programming relied upon by WTSP-TV in the original hearing was merely a facade or constituted a misrepresentation. (R. 6222. Emphasis supplied.)

Appellee completely ignores the foregoing language from the Commission's second Decision. Intervenor attempts to pass it off as meaning that the Commission did not rely on WLCY's most recent performance "as new and additional evidence of likelihood of effectuation of the WTSP-TV, Inc., proposal" (BR. 28). But the Commission made no reference to "new and additional evidence of likelihood of effectuation;" rather, it plainly said that it was affirming the original preference based upon the evidence elicited in the original hearing because the subsequent hearing did not establish that the programming relied upon in the original hearing was merely a facade or constituted a misrepresentation.

In other words, the Commission gave no consideration to the evidence adduced at the remand hearing except insofar as it provided a basis for the conclusion that the Rahalls had acted in good faith.

It is submitted that the Commission's Decision herein must be reviewed by this Court upon the basis of what the Commission itself said it did, and not upon the basis of what Appellee and Intervenor say it did. In contending that the Commission considered and evaluated the new WLCY programming, which the Commission plainly said it did not, Appellee and Intervenor virtually concede that the Commission's Decision

cannot be sustained, unless the Commission's own explanation of its decisional process is either ignored or misconstrued.

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BRIEF FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19172

SUNCOAST CITIES BROADCASTING CORPORATION,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee.

Appeal from a Decision of the
Federal Communications Commission

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STATEMENT OF QUESTIONS PRESENTED

The parties have stipulated that the following questions are presented in this appeal:*

1. Whether in the remand hearing in this proceeding the Commission committed error in the following respects:
 - a) In failing to conclude that the evidence in the remand hearing required the withdrawal of the "significant preference" for past broadcast record awarded to the winning applicant (WTSP-TV) in the original hearing; and
 - b) In refusing to reevaluate all applicants for a new television station license for Channel 10 at Largo, Florida, on a comparative basis in light of the entire record in this proceeding.
2. With respect only to the appeals in Cases No. 19,048 and 19,172, whether contrary to the requirements for a fair hearing, the Commission made basic findings of fact and conclusions contrary to and unsupported by substantial evidence of record, failed to make other findings and conclusions compelled by substantial evidence of record and reached ultimate findings and conclusions not rationally derived from or supported by the basic findings or substantial evidence of record.**
3. Florida Gulfcoast Broadcasters, Inc., appellant in Case No. 19,048, and Suncoast Cities Broadcasting Corporation, appellant in Case No. 19,172, both assert as an issue that the Commission committed error in the remand hearing by refusing to update the record regarding all the applicants in this proceeding. The appellee and the intervenor do not agree that this issue is raised by the appellants' notices of appeal.

* These are the questions set forth in the stipulation which relate specifically to Case No. 19,172.

** The appellee and the intervenor reserve the right to argue that this issue is so generally stated and is so lacking in specificity as to fail to meet the requirements for a meaningful issue on appeal.

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,172

SUNCOAST CITIES BROADCASTING CORPORATION,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee.

Appeal from a Decision of the
Federal Communications Commission

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from a Decision of the Federal Communications Commission (R. 6208-6232)¹ affirming the earlier grant of a construction

¹ It has been stipulated by the parties to this appeal that a Joint Appendix will be filed filed within ten days after the filing of appellants' reply briefs, and that the briefs of the parties would refer to page numbers in the original record. The transcript in these consolidated cases is associated with Florida Gulfcoast Broadcasters, Inc., the lead case (No. 19,048).

permit on VHF channel 10 at Largo, Florida, to WTSP-TV, Inc., and denying five mutually exclusive applications for the facility (including that of appellant). Thus, appellant asserts standing to bring this action under Section 402(b)(1) of the Communications Act of 1934, as amended. (47 U.S.C. §402(b)(1)), Rule 37 of this Court, and Section 10 of the Administrative Procedure Act (5 U.S.C. §1009) as an "applicant for construction permit . . . whose application is denied by the Commission."

STATEMENT OF THE CASE

On June 3, 1957, Appellee assigned television Channel 10 as a third VHF channel to Largo, Florida in the Tampa-St. Petersburg area. Appellant and five other parties filed applications for the new facility.

A comparative hearing commenced in May, 1958, and on January 19, 1962, the Commission released a Decision (R. 4810-4838), granting the application of WTSP-TV, Inc., and denying the five competing applications (those of Appellant, City of St. Petersburg, Bay Area Telecasting Corporation, Florida Gulfcoast Broadcasters, Inc., and Tampa Telecasters, Inc.).

In evaluating the applicants, the Commission gave the following preferences under its "comparative criteria":

Area Familiarity: City and Suncoast (R. 4817)

Integration of Ownership and Management: Gulfcoast (R. 4817)

Broadcast Experience & Past Broadcast Record: WTSP-TV (R. 4821-4822)

Diversification of Ownership of Mass Media: Suncoast, Bay Area and Tampa (R. 4822)

Proposed Programming: No preference (R. 4814-4815)

Equipment, Studios & Staff: No preference (R. 4816)

In its Decision, the Commission stated, *inter alia*, that:

"The Commission concludes that of the applicants relying on past broadcast records, WTSP-TV is entitled to a *significant preference*." (emphasis added)

* * * * *

"Here the Examiner concluded, and we agree, that the Rahalls' operation of Station WLCY [formerly WTSP] since 1956 better served the needs of St. Petersburg than the operation of WTSP under the [former] ownership of [a Gulfcoast principal]. This factor, taken together with WTSP-TV's more extensive broadcast experience, outweighs Gulfcoast's preferences for somewhat greater area familiarity and integration and convinces us that WTSP-TV will more likely effectuate its proposal."
(R. 4823)

Petitions for Reconsideration were filed by four of the losing applicants (R. 4846-4881, 7054-7123, 8133-8176, 8926-8943). Two parties also requested reopening of the Record and enlargement of the issues as to WTSP-TV, Inc., alleging that WTSP-TV had scuttled virtually all of the non-entertainment programming on which it based its case shortly after the close of the hearing and had drastically revised its program format to "Top 40" recordings and news. These Petitions urged that the programming relied upon by WTSP-TV at the hearing had been a sham, inaugurated to provide "window dressing" for WTSP in the comparative television case, and was callously abandoned after it had served its purpose.

The Commission, on its own motion, by Order of June 29, 1962 (R. 5044-5048), stayed the effectiveness of the grant to WTSP-TV and remanded the proceeding to the Examiner for further hearing on the following issues:

1. To determine the nature of the programming service rendered by Station WLCY since the close of the record herein on May 16, 1960, and the extent to which such service differs from that relied upon by WTSP-TV at the earlier hearing herein.
2. To determine the reasons underlying (a) the choice of programming service of Station WLCY relied upon by WTSP-TV at the earlier hearing herein; and (b) the choice of programming service of that station since May 16, 1960.
3. To determine, in light of the facts developed under the foregoing issues, (a) whether WTSP-TV, Inc., possesses the requisite character qualifications to be a licensee of

the Commission, and (b) whether, and in what respects, modification of the Commission's Decision in this proceeding is required.

Further hearings were held between November 27, 1962, and April 4, 1963 (Tr. 6120-9088).

The Raball brothers acquired WTSP in October, 1956 (Tr. 6146). They hired a manager who was instructed to determine what new programs were to be added to WTSP (Tr. 6149-6151), although the applicant's President himself decided to scrap some programs. (Tr. 6149).

In its Decision here under review the Commission concedes that WTSP-TV relied in the original hearing on 24 non-entertainment program series in connection with its past broadcast record. It finds that 13 of these programs were on the air before it allocated VHF channel 10 to the Tampa-St. Petersburg area in June, 1957 (although rule making toward that end had been outstanding since 1955). The remainder were added subsequent to that date. Nine of these 24 programs ("Fishing the Sun-coast", "Voice of Seniors", "Church Bulletin Board", "Progress of Pinellas", "Conversational Spanish", "Teen Topics", "Social Security", "V.A. News" and "Legal and Medical Forums") had counterparts in the proposed TV schedule. The final date of the original hearing was December 4, 1959 (Tr. 5902), and an order closing the record was entered on May 17, 1960 (R. 4533-34).

In July, 1959, WTSP changed its call letters to WLCY to tie in to the name of a person ("Elsie") (R.6216). Subsequently, in February, 1960, a change to a "Top 40" format was effected. All "block programs" (*i. e.*, 15 minutes or longer) were dropped, and subsequent to early 1960, only 3 of the 24 program series relied on at the hearing were carried by WLCY. (R. 6215-6216) The station's program director conceded that the majority of the station's non-entertainment programs now appear in the station's schedule between midnight Saturday and noon Sunday (Tr. 6638).

The Examiner on August 30, 1963, released a Supplemental Initial Decision (R. 6016-6081) absolving WTSP-TV, Inc. of misrepresentation or "sham" programming and affirming the earlier grant.

Exceptions were filed by all other applicants and by the Commission's own Broadcast Bureau (which urged that the WTSP programming offered at the earlier hearing was a sham foisted on the Commission and that WTSP-TV should be absolutely disqualified from further participation in the hearing).

The Commission (with Commissioner Bartley dissenting) issued a Decision on November 6, 1964 (R. 6208-6232) affirming the Examiner's action granting WTSP-TV, Inc. In so doing, however, it stated, *inter alia*:

"For the purpose of clarification, we point out that we do not rely on WLCY's most recent performance record as evidence of likelihood of effectuation."

Petitions for Reconsideration by Appellant and another applicant were denied by Commission Order released January 13, 1965 (R. 6261-6262). This appeal followed.

STATUTES INVOLVED

COMMUNICATIONS ACT OF 1934, AS AMENDED, 47 U.S.C. 151, *et seq.*

Section 402(b) (47 U.S.C. 402(b))

Appeals may be taken from decisions and orders of the Commission in any of the following cases:

(1) By any applicant for a construction permit or station license, whose application is denied by the Commission.

* * * * *

ADMINISTRATIVE PROCEDURE ACT, 5 U.S.C. 1001 *et seq.*

Section 10 (5 U.S.C. 1009)

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion —

(a) RIGHT OF REVIEW. — Any person suffering legal wrong because of any agency action, or

adversely affected or aggrieved by such action within the meaning of the relevant statute, shall be entitled to judicial review thereof.

* * * * *

(e) **SCOPE OF REVIEW.** — So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations, the Court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

STATEMENT OF POINTS

I. The Commission has erred in failing to withdraw the "significant preference" for past programming accorded WTSP-TV, Inc.

II. The Commission erred in not reassessing all of the applicants on the comparative criteria in its decision on remand.

SUMMARY OF ARGUMENT

I.

The Commission originally awarded a construction permit to WTSP-TV, Inc. over five other applicants on the basis that its past broadcast record in the city concerned was meritorious enough to give the Commission the assurance that it could be best expected to effectuate its proposed television programming. Shortly after the close of the record in that proceeding, WTSP-TV junked virtually all of the programs which had impressed the Commission, substituting therefor a "Top 40" music and news format utilizing contests, jingles and reducing practically all of its programs (except music and news) to one and two-minute presentations.

On representations to that effect by other applicants, the Commission stayed the grant and reopened the record to inquire into whether the earlier programming had been a sham to provide "window dressing" to improve WTSP-TV's competitive position in the forthcoming television hearing.

After considering the remand evidence, the Commission concluded that the earlier WTSP programming had not been a sham, but went on to note that it no longer considered WTSP-TV's programming in its present form as evidence of the probability that WTSP would effectuate its television program proposal. Thus, the Commission struck down the factual basis for its earlier award of a past programming preference while at the same time refusing to alter the conclusion flowing from this factual foundation that WTSP-TV is entitled to a "significant preference" for past programming. Such a conclusion cannot stand absent ultimate findings of fact to support it. *Johnston Broadcasting Company v. Federal Communications Commission*, 85 U.S. App. D.C. 40, 175 F 2d 351. If the Commission had any other factual basis for again awarding a past programming preference to WTSP-TV or reassessing the weight accorded such preference, it did not so state in the decision here under review. This too constituted error. *Melody Music, Inc. v. Federal Communications Commission*, ___ U.S. App. D.C. ___ (decided April 8, 1965).

II.

Once the Commission found that WTSP-TV's current operating format is no evidence of likely effectuation of its television proposal, it was incumbent on the Commission to withdraw the past programming preference accorded WTSP-TV, Inc., or at a minimum to reassess the weight to be accorded this, the *sole* comparative preference accorded WTSP-TV, Inc. Any withdrawal or reassessment necessarily called for a recomparison of all applicants on all of the comparative criteria, since the basis for the original award to WTSP-TV involved such a fine line of choice among the applicants that this very past programming preference tipped the scales in favor of WTSP-TV, Inc.

In the alternate, the seven-year old proceeding should be remanded with instructions that the Commission accept new applications and conduct an entirely new proceeding. *WORZ, Inc. v. Federal Communications Commission*, ____ U. S. App. D.C. ____ (1965).

ARGUMENT

I.

The Commission Has Erred in Failing to Withdraw the "Significant Preference" for Past Programming Accorded WTSP-TV, Inc.

In its decision in the initial phase of this proceeding, the Commission made the following preferential (first place) choices under its "standard comparative criteria": Area Familiarity - a joint preference for Appellant Suncoast, the City of St. Petersburg; Integration of Ownership and Management - Gulfcoast; Broadcast Experience and Past Broadcast Record - WTSP-TV, Inc.; Diversification of Ownership of Mass Media - a joint preference to Appellant Suncoast, Bay Area and Tampa Telecasters. On the factors of Proposed Programming and Equipment, Studios and Staff, the applicants were deemed to be on a par, and no preference was awarded.¹ Thus, WTSP-TV, Inc. was favored on only *one* of the six criteria discussed in the decision.

In choosing WTSP-TV, Inc., the Commission awarded it a "*significant preference*" (emphasis added) for broadcast experience in that it has operated a multiple chain of broadcast stations, reinforced by the manner in which it had operated Station WTSP in the very area here concerned (albeit over only a short period of time). This "significant preference" was of decisional significance because it boosted WTSP-TV, Inc. above its competitors (Appellant Suncoast with its preference in two comparative areas, the City, Gulfcoast, Bay Area and Tampa Telecasters in one area each) for the reason that, in the Commission's words, it "convinces us that WTSP-TV will more likely effectuate its proposal."²

¹ It should be noted that Appellant Suncoast was the only applicant to be preferred on two comparative criteria.

² In the Commission's view, Gulfcoast's vulnerability on the diversification of ownership of the mass media of communications criterion offset a lesser preference for Gulfcoast for "somewhat greater area familiarity and integration."
(R. 4822)

In sum, the Commission's choice of WTSP-TV, Inc. was manifestly based on what it felt was a *greater likelihood of effectuation* of WTSP-TV's program proposal in the light of its past operation.

Yet, shortly after the conclusion of the hearing in which WTSP-TV advanced its "past broadcast record" which so impressed the Commission that it awarded a "significant preference" (and a decisional one), WTSP-TV virtually abandoned non-entertainment and news programs five minutes or greater in length (except for the 10-12 p.m. hours and midnight Saturday to noon Sunday), discarding even the programs and participants proposed to be directly translated into the TV schedule. In place of the programming held up by WTSP-TV in the original hearing as a "model", it switched to "Top 40" records and news, with one- and two-minute announcements and similar "public service" features for virtually its entire week-day, 24-hour schedule.³

With the drastic change in the station's programming conceded by WTSP-TV, the Commission was compelled to conclude in the Decision here under review that "we do not rely on WLCY's most recent performance record as evidence of likelihood of effectuation." But, although the Commission thus eliminated the critical basis for its earlier choice of WTSP-TV, the Commission nevertheless affirmed the grant to that applicant. In other words, the Commission negated the prior factual showing

³ In February 1960, WLCY hired a new "Operations Manager" (Roy Nilson) who had previously worked at "Top 40" stations in Cocoa and Tampa, Florida. He tried to hire an employee of a St. Petersburg station, explaining that WLCY "will be a Top 40 format, with all the 'bizazz' that goes with it." (tr 7829,7840-1). The prospective employee further testified that:

"After Nilson went to WLCY, I listened to its programming which followed the same general pattern of (the Tampa station which formerly employed Nilson), using 'top 50' music, contests, and the sensational type news. I remember in particular a 'Treasure Hunt' for a new car that was broadcast which was similar to contests carried by WALT. I also listened to the Open Mike program after Nilson took over. Many of the calls would come in from obviously teenage youngsters who would talk about matters of little adult interest. From my experience in radio broadcasting I did not consider that the calls were representative of the adult segment of the thinking public of the area." (R. 5283).

by WTSP-TV, but improperly allowed the conclusion flowing therefrom to stand. In so doing, it invalidated its decision. *Johnston Broadcasting Company v. Federal Communications Commission*, 85 U.S. App. D.C. 40, 175 F 2d 351. If the Commission chooses to again make the award to WTSP on other grounds than the discredited past programming, it must clearly explain such reasons. *Melody Music, Inc., v. F.C.C.*, ____ U.S. App. D.C. ____ (decided April 8, 1965).

While appellant does not concede that the pre-hearing WTSP programming was not a "sham" and "window-dressing" discarded after it had served its purpose, even assuming *arguendo* that the Commission's resolution of the remand issues favorable to WTSP-TV was correct, the Commission nevertheless erred in failing to withdraw its critical preference to WTSP-TV for past programming in view of what the record at the remand hearing shows.

II.

The Commission Erred in Not Reassessing All of the Applicants On the Comparative Criteria in Its Decision On Remand

As noted in the discussion of the previous point, the Commission's original decision accorded *primary* (i.e., first place) preferences in two comparative criteria to various other applicants.

In addition, the Commission ranked the applicants in order of preference by awarding *secondary* credit in several areas of the comparative criteria. In this manner, the Commission was able to balloon WTSP-TV's one primary preference into a decisional distinction over the other applicants awarded various combinations and degrees of preferences. The distinguishing factor in the original decision was the later-discredited consideration of "probability of effectuation" of WTSP-TV's proposed TV programming geared to WTSP's past record of operation.

That supporting foundation for the Commission's ultimate choice of WTSP-TV in its first Decision was specifically withdrawn after consideration of the evidence in the remand proceeding when the Commission stated that "we do not rely on WLCY's most recent performance record as evidence of likelihood of effectuation."

Clearly, therefore, a re-evaluation of the applicants was essential to a determination of which applicant -- in the light of all of the evidence then available to the Commission -- could best be expected to operate the contested channel in the public interest. *Scripps-Howard Radio, Inc. v. F.C.C.*, 89 U.S. App. D.C. 13, 189 F 2d 677. The Commission has so decided in other cases, *WIBC, Inc.*, 22 RR 425, 471; and has re-evaluated applicants on the comparative criteria in view of changed circumstances. *WORZ, Inc.*, 2 RR 2d 727.

The Commission, however, made no such re-evaluation in the instant case. Instead, it chose to affirm its earlier award, merely stating that "in view of the seven years of protracted hearings and the three decisions [i.e., two by the examiner and the Commission's first decision] all preferring WTSP-TV, we should not, absent extraordinary reasons, re-evaluate this case from a *de novo* standpoint."

Certainly the fact that this proceeding has been so protracted cannot validate an erroneous affirmation of a now discredited pivotal preference. To be sure, the public interest is served by dispatch and finality in administrative proceedings, but this consideration cannot condone legal error. The paramount public interest consideration here is which applicant is best qualified to operate the proposed facility in a manner responsive to the needs and interests of its viewers. Both law and reason compel a judgment based upon a re-evaluation of the applicants under the Commission's overall comparative criteria in the light of current circumstances. The Court may also wish to give consideration to remanding the case to the Commission with instructions to update the record or with instructions to accept new applications for the facility. *WORZ, Inc. v. Federal Communications Commission*, ____ U.S. App. D.C. ____, ____ F 2d ____.

CONCLUSION

For the foregoing reasons, the Commission's Order of November 6, 1964 (R. 6208-6232) granting the application of WTSP-TV, Inc. and denying Appellant's mutually-exclusive application should be set aside, vacated, annulled and determined to be invalid; the proceeding should be remanded to the Commission with instructions to reassess the applicants on a comparative basis in light of the changes in circumstances developed in the remand record or, in the alternative, with instructions to accept such new applications for the facility as may be forthcoming and conduct an entirely new comparative proceeding. The Court is respectfully requested to grant to appellant such further and different relief as may seem just to it.

Respectfully submitted,

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United States Court of Appeals
for the District of Columbia Circuit

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REPLY BRIEF FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,172

.SUNCOAST CITIES BROADCASTING CORPORATION,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee.

Appeal from a Decision of the
Federal Communications Commission

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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REPLY BRIEF FOR APPELLANT

- I. **Appellee and Intervenor Have Failed to Come to Grips with Appellant's Contentions That WTSP-TV's Past Broadcast Record Preference Must Be Set Aside and All the Applicants Reevaluated Under the Commission's Comparative Criteria**
-

The Commission assesses past broadcast records in comparative proceedings to the extent that such evidence may demonstrate the degree

of probability that an applicant can be expected to carry out (effectuate) its program proposals. In the instant case, the Commission in its original decision (R. 4823) was so impressed with WTSP's standard broadcast program performance in the Tampa area that it awarded WTSP a preference on that criterion, which subsequently proved to be of pivotal decisional significance.

Findings of fact under the Commission's comparative criteria cannot be considered *in vacuo*; they have relevance only to the degree that they assist the Commission in determining which of competing applicants can be expected to best operate a requested facility in the public interest. Thus, for example, integration of ownership and management is pertinent only to the extent that it demonstrates the degree of personal responsibility and supervision which it can be anticipated will be exercised by an applicant or its principals; local residence is of probative value only because it indicates that an applicant can be expected to be aware of changing local needs and interests on a continuing basis and translate such knowledge into the station's program schedule; and past broadcast operations are significant only to the extent that they demonstrate to the Commission the extent of the likelihood that an applicant will operate a station in the manner proposed in its application. The *fact* of integration, local ownership or a favorable (or unfavorable) record of previous broadcasting operation means nothing *per se*; it is the predictability of the type of future station operation which is of significance in the Commission's comparative decision-making process.

The Commission's final decision in this proceeding cannot stand, for it fails to nullify the pivotal preference awarded WTSP-TV, Inc. for its past (*i.e.*, before the original hearing) operation of Station WTSP, while at the same time stating on the basis of the remand evidence as to WTSP-TV's current operation of WLCY that:

"For the purpose of clarification, we point out that we do not rely on WLCY's most recent performance record as evidence of likelihood of effectuation." (R. 6222)

The decision goes on to say that the Commission affirms its prior award to WTSP-TV, Inc. because the remand record did not demonstrate that WLCY's earlier programming operation "was merely a facade or constituted a misrepresentation."

Even accepting the Commission's view that the remand hearings did not demonstrate that the earlier WTSP programming was a sham designed to secure a preference for it in the TV proceeding, we are not here concerned with the assessment of a comparative demerit to WTSP-TV for its more recent programming but merely neutralization of the earlier affirmative *preference* awarded it, because of the Commission's finding that the recent WLCY operation no longer demonstrates likelihood of effectuation. The Commission was, under these changed circumstances, required by law to delete WTSP-TV's preference for past programming. *Enterprise Co. v. F.C.C.*, 97 U.S. App. D.C. 374, 231 F.2d 708, *cert. den.* 351 U.S. 920; *Butterfield Theatres, Inc. v. F.C.C.*, 99 U.S. App. D.C. 71, 237 F.2d 552. It follows that once WTSP-TV's decisional preference evaporates, the Commission must be required to reassess WTSP-TV and the appellants on all of the comparative criteria. *Scripps-Howard Radio, Inc. v. F.C.C.*, 89 U.S. App. D.C. 13, 189 F.2d 677. And it had the procedure available to it to do so in the form of pending timely filed petitions for reconsideration which it denied out of hand in its final decision on the remand record.

Appellant urges that the Court reverse and remand this proceeding to the Commission with instructions to reevaluate the applications of appellants and the intervenor on all of the comparative criteria, or

in the alternative, that the case be remanded to the Commission with orders to update the record and reevaluate all of the applicants and/or order that new applications be accepted and an entirely new comparative proceeding be conducted.

Respectfully submitted,

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